Benesch

White Collar QUARTERLY REPORT

2024

In This Issue

Firm News

Matthew David Ridings
Partner

Benesch grows white collar practice group with the addition of skilled trial attorney

Matthew David Ridings, a Certified Compliance and Ethics Professional (CCEP), joins Benesch's nationwide White Collar, Government Investigations & Regulatory Compliance and Antitrust practice groups as a partner in the Cleveland office. His practice encompasses government enforcement, internal investigations, and compliance matters, with a specific emphasis on international antitrust, product distribution, and anti-corruption issues. He has successfully tried criminal and civil cases involving allegations of antitrust violations, corruption, and other competition-related violations, including matters related to the FCPA and RICO. Ridings also represents and advises corporate executives, multinational corporations, and their boards of directors in response to civil and criminal inquiries from the DOJ, FTC, and SEC, and has substantial experience managing investigations involving the European Commission, Japan Fair Trade Commission, and the Canadian Competition Bureau, among others.

SOURCE: Benesch

Christopher Grohman
Partner

Benesch white collar partner selected to 2024 Illinois Super Lawyers list

Christopher Grohman, a partner in Benesch's nationwide White Collar, Government Investigations & Regulatory Compliance practice group, was selected by his legal community peers to the 2024 Illinois Super Lawyers list. The Super Lawyers selection process evaluates lawyers based upon multiple criteria, including professional achievement and peer recognition; honors and awards; firm and bar involvement and leadership; scholarship and professional writings; community service and pro bono activities; and other outstanding achievements. Only 5% of attorneys are chosen for the Super Lawyers list.

SOURCE: Benesch

Upcoming Events

Caribbean Regional Compliance Association (CRCA) Conference 2024

Oct. 17-18, 2024 | St. Maarten
Shaneeda Jaffer to speak on panel "'Taking Aim' - Delve into the role of artificial intelligence as it enables and disrupts the compliance space."

GIR Live: Annual Investigations Meeting New York 2024

Sept. 26, 2024 | New York
Marisa Darden to speak on panel "Call us before we call you—DOJ whistleblower rewards and self-disclosure pilot."

PwC's 2024 Global Economic Crime Survey: Meeting tomorrow's challenges, embracing risk intelligently

Aug. 28, 2024 | Webinar
Marisa Darden to speak as part of a panel covering the major themes and practical take-aways of PwC's recently published Global Economic Crime Survey (GECS) and the implications for corporations with international operations. This edition of GECS focuses on five risk areas: fraud, corruption, supply chain risk, export controls and sanctions.

Key Findings

In 2023, the number of federal corporate prosecutions remained far below the 25-year average after two consecutive years of increases.

- The DOJ's **Fraud Section secured just $690 million in penalties across eight corporate resolutions** in 2023, marking the first time total fines dipped below $1 billion since at least 2015. However, convictions at trial remain historically high despite dropping year-over-year.
- The U.S. government and whistleblowers were parties to a record 543 False Claims Act settlements and judgments during the fiscal year that ended Sept. 30, 2023. These settlements and judgments recovered over $2.68 billion, reflecting the DOJ's focus on key enforcement priorities, including fraud in pandemic relief programs.
- **The balance of 2024 is seen as a crucial period for the DOJ to assert its authority** in holding corporate criminals accountable.

SOURCES: Public Citizen, U.S. Department of Justice, Reuters

In a move that could help it fulfill its pledge **to ramp up corporate prosecutions, the department plans to launch a pilot program to reward whistleblowers** who voluntarily self-disclose criminal abuses of the U.S. financial system, foreign corruption cases outside the SEC's jurisdiction, and domestic corruption cases.

- The DOJ hopes the program will fill gaps in the existing framework of federal whistleblower programs.
- To reinforce this pilot program and the department's existing corporate voluntary self-disclosure program, the Criminal Division launched a pilot program to provide clear incentives to the first person to report misconduct voluntarily.
- The Criminal Division's Voluntary Self-Disclosures Pilot Program for Individuals has many of the same parameters as the Whistleblower Pilot Programs rolled out by the U.S. Attorney's Offices for the Southern District of New York and the Northern District of California in February and March, respectively. These state pilot programs are also designed to encourage individuals to disclose information regarding criminal conduct voluntarily.
- Even as lawmakers criticize its delay in fully implementing the Anti-Money Laundering and Sanctions Whistleblower Program, FinCEN touted that the program had received more than 240 unique tips as of Feb. 22.
- Meanwhile, **the U.S. Supreme Court held that the Sarbanes-Oxley Act does not require whistleblowers to prove that the employer acted with retaliatory intent**.
- The **SEC underscored its aggressive approach to protecting whistleblowers** in one of the first cases targeting customer agreements. A JPMorgan unit will pay a record $18 million to resolve the SEC claims it violated a whistleblower protection rule. Higher penalties could encourage more people to report such violations to the SEC.
- The CFTC is scrutinizing whether the non-disclosure agreements in the swaps and clearing businesses at Wall Street banks silence would-be whistleblowers.
- In the U.K., the Serious Fraud Office promised to push ahead with its plan to reward whistleblowers as part of its new five-year strategy in hopes of increasing the speed of investigations.

SOURCES: Benesch, Public Citizen, U.S. Department of Justice, Bloomberg Law, The Wall Street Journal, Financial Crimes Enforcement Network, Bloomberg, City A.M., Reuters

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The DOJ is also expected to bring significant cases for violations of trade sanctions, export controls, and anti-money laundering laws in 2024 as the National Security Division sharpens its enforcement focus.

- This comes after the Intellexa Consortium became the first spyware organization sanctioned by the U.S.
- In a case highlighting that financial institutions with global clientele may face certain sanctions risks, Swiss private bank EFG International agreed to pay $3.74 million for processing 873 securities transactions in apparent violation of U.S. sanctions.
- Meanwhile, the OFAC and State Department sanctioned more than 500 entities and individuals in its most extensive sanctions package against Russia since its full-scale invasion of Ukraine began two years ago.

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- The BIS imposed additional controls to further restrict Iran's access to basic commercial-grade microelectronics and other low-level technologies.
- At the same time, the agency is removing Commerce Control List license requirements to allow certain Commerce-controlled items to be exported or re-exported to Australia and the U.K. without a license.
- It also clarified rules restricting China's access to advanced computing semiconductors and semiconductor manufacturing equipment, as well as items that support supercomputing applications and end-uses.
- The chip powering the Huawei Mate 60 Pro phone is years behind American chips, suggesting that U.S. curbs on shipments to the Chinese company are working.

SOURCES: Bloomberg Law, U.S. Department of Justice, Axios, U.S. Department of Treasury, Bureau of Industry and Security, Reuters

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The DOJ is evolving to meet new and emerging threats from AI and other disruptive technologies. It plans to seek stiffer sentences where AI is deliberately misused to make white-collar crime significantly more serious.

- Meanwhile, the Treasury Department outlined further steps to address immediate AI-related operational risk, cybersecurity, and fraud challenges in the financial services sector.

SOURCES: U.S. Department of Justice, U.S. Department of Treasury

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The number of enforcement actions against global financial institutions reached rarely-seen levels in the U.S. in 2023, as both the SEC and CFTC cracked down on smaller firms.

- The CFTC issued a record $4.3 billion in penalties, while the SEC doled out $4.9 billion in fines.
- The penalties in Europe did not match those in the U.S. in 2023 but are expected to be higher in 2024.
- The costs to comply with financial crime regulations have risen for 99% of financial institutions in the U.S. and Canada. As a result, 70% are looking at reducing these costs.
- In April, the SEC emerged victorious in its first-ever enforcement action targeting "shadow" insider trading, which has gone largely unchecked. The jury verdict expands what counts as insider trading and could have broad implications for traders and investors.
- Speaking of the SEC, the New Civil Liberties Alliance suggested it is just a matter of time before a company challenges the constitutionality of the agency's follow-on administrative enforcement proceedings.

SOURCES: SteelEye, LexisNexis Risk Solutions, Bloomberg, MarketWatch, Bloomberg Law

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Elsewhere in the U.S., the Treasury Department appealed a **federal judge's ruling that the bipartisan Corporate Transparency Act (CTA) is unconstitutional.** If applied more broadly, the decision could hobble critical anti-money laundering efforts. It could also **open the door for businesses to bring their own legal challenges** in hopes of escaping the nascent beneficial ownership reporting requirements.

- In an effort to close loopholes used to launder money, FinCEN proposed a pair of rules targeting the investment adviser and real estate markets. This comes as the agency looks to drive compliance by becoming increasingly active in the enforcement space.

SOURCES: Benesch, Bloomberg Law, FACT Coalition, Financial Crimes Enforcement Network

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Corruption levels stayed stagnant globally in 2023, according to Transparency International's latest Corruption Perceptions Index. Although countries with a strong rule of law and well-functioning democratic institutions often top the index, the Americas face challenges combatting corruption, primarily due to the lack of independence of the judiciary in the region.

- In a case seeking to limit a federal corruption statute to quid pro quo bribery, the U.S. Supreme Court appeared likely to side with a convicted Indiana mayor. One of the justices suggested a narrower reading of the statute would still let the government prosecute some gratuities but not all.
- The DOJ charged 70 current and former New York City Housing Authority (NYCHA) employees with bribery and extortion in the largest-ever single-day bribery takedown.

SOURCES: Transparency International, Bloomberg Law, U.S. Department of Justice

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On the other side of the Atlantic, **the U.K.'s Financial Conduct Authority is defending its plan to "name and shame" the companies it is investigating at an early stage**, despite lawmakers' concerns that doing so poses risks to the overall integrity of the market.

- The financial regulator is also hoping the conviction of a former Goldman Sachs analyst serves as a wake-up call that it is serious about insider trading.
- The European Parliament adopted a package of laws to combat money laundering. Among the laws is one that would establish an authority to directly supervise the riskiest financial entities and implement targeted financial sanctions.
- Switzerland is intensifying efforts to crack down on companies and individuals who are using the neutral country to evade sanctions that were imposed on Russia
- The Monetary Authority of Singapore tightened anti-money laundering regulations covering crypto players.
- Amid dissatisfaction with how white-collar crime is pursued in Germany, Anne Brorhilker—the lead prosecutor in the country's most notorious tax fraud scandal—resigned.

SOURCES: Bloomberg, The Financial Times, European Parliament, Nikkei Asia

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Back stateside, the **U.S. Department of Education issued its long-awaited final Title IX regulations and has already been hit with lawsuits** alleging it exceeded its authority and violated the law itself by extending protections for LGBTQ+ students.

- The department's rulemaking process for Title IX regulations relating to athletics remains ongoing.
- Meanwhile, the NAIA Council of Presidents approved a policy that only allows athletes whose biological sex assigned at birth is female and who have not begun hormone therapy to participate in NAIA-sponsored female sports. It is believed to be the first college sports organization to do so.
- Elsewhere, the NCAA's Division I Board of Directors ratified NIL reforms in January and April, giving student-athletes NIL protections, access to additional school assistance with NIL activities, and more flexibility to transfer.
- However, the NCAA could be forced to expedite the timeline of its NIL rule changes after Virginia's governor signed a bill to allow a public or private institution of higher education in the commonwealth to compensate student-athletes for their NIL, starting July 1. This adds to a patchwork of state NIL laws that have created chaos in college sports.
- In the meantime, the NCAA has halted investigations into booster-backed collectives and other third parties making NIL deals with Division I athletes after a Tenn. federal judge issued a preliminary injunction barring the organization from enforcing its rules prohibiting NIL compensation for recruits.

SOURCES: Benesch, U.S. Department of Education, K-12 Dive, The Associated Press, NCAA, Sports Illustrated, Axios, NBC News

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In antitrust-related news, nine Democrats from the U.S. House of Representatives are asking the Department of Justice to look into **allegations of antitrust behavior among U.S. oil producers and OPEC**. They allege that major oil producers are colluding to keep prices high, overstating their profits at consumers' expense. In other headlines:

- Dozens of states joined the Justice Department in **suing to break up Ticketmaster and its parent company, Live Nation**, based on allegations they have illegally monopolized the industry at the expense of fans, artists and venues. If successful, the case could lead to Live Nation being forced to sell Ticketmaster, which it acquired after a DOJ settlement more than a decade ago.
- A judge **denied Google's motion to end its antitrust case over digital advertising**, saying the internet search giant must face trial on claims it illegally dominates the online advertising market. The trial is set to begin in September.
- Four additional states joined the **DOJ's lawsuit against Apple for monopolizing smartphone markets**. According to the Justice Department, Apple is in violation of Section 2 of the Sherman Act.

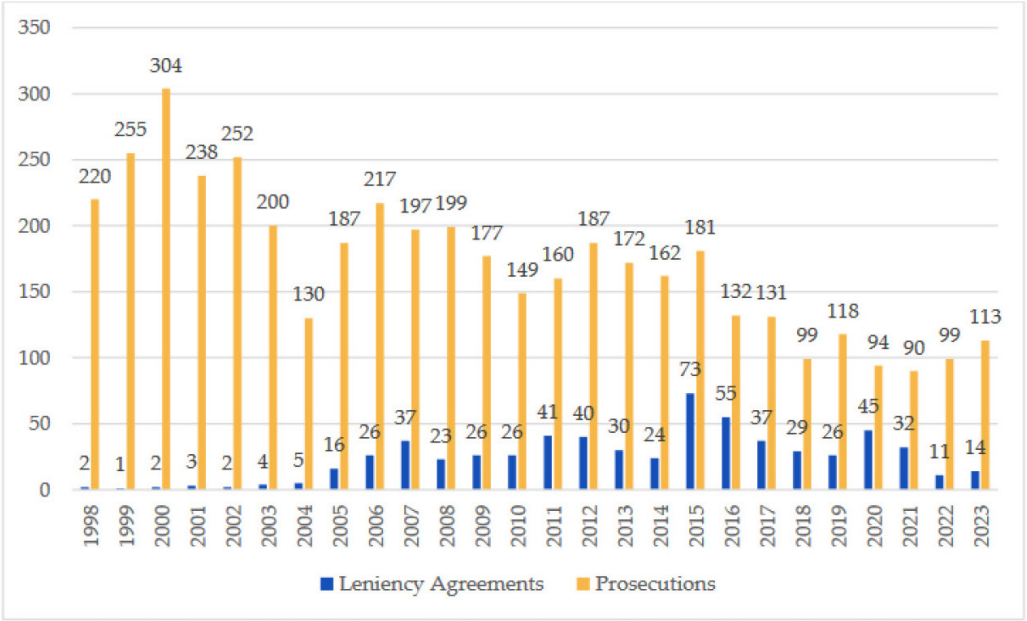
SOURCES: U.S. Department of Justice, Reuters, Politico

Trends

Public Citizen: DOJ prosecuted more corporations in 2023 than in 2022 but continues to overuse leniency agreements

Although the number of federal corporate prosecutions increased to 113 in 2023 from 99 in 2022, according to data from the U.S. Sentencing Commission, it remains far below the 25-year average of 172. Nevertheless, the modest uptick is a welcome shift, as such federal prosecutions have been trending downward since 2000—when the DOJ prosecuted 304 corporations-and hit a quarter-century low of 90 in 2021, Public Citizen notes. The proportion of resolutions in which leniency agreements were reached dropped to 11% in 2023 from 32% in 2020, but the nonprofit consumer advocacy organization insists such deals remain overused and tend to benefit larger corporations.

Corporate prosecutions and leniency agreements, fiscal years 1998-2023



Source: Public Citizen analysis of data from the US Sentencing Commission, Violation Tracker, and the Corporate Prosecution Registry

Public Citizen underscores that it is the DOJ's responsibility to deter corporate decision-makers from prioritizing profits over the law rather than shielding them from the repercussions of misconduct. However, the group welcomes the DOJ's new policy of incentivizing corporate crime whistleblowers, saying it could enable the department to fulfill its bold promise of ramping up corporate prosecutions. It sees the remainder of 2024 as a crucial period for the DOJ to assert its authority in holding corporate wrongdoers accountable.

The 2021 deferred prosecution agreement the Trump administration reached with Boeing over a single count of defrauding the federal government for aircraft crashes that resulted in the loss of 346 lives expired on January 7, 2024. The DOJ has until July 7 to decide whether to prosecute the aerospace company for any criminal violation it may have committed.

SOURCES: Public Citizen, U.S. Sentencing Commission, ABC News

DOJ officials highlight efforts to crack down on white collar crime at conference, AG sees prosecutions of executives as 'greatest deterrent'

As Benesch previously shared, At the American Bar Association's 39th National Institute on White Collar Crime, Deputy AG Lisa Monaco highlighted that the DOJ is executing its priorities, which include driving real accountability by bringing serious charges against senior executives. AG Merrick Garland said the department's top priority is prosecuting individual bad actors, as the fear of individual prosecutions of company executives is the "greatest deterrent" to white-collar crime.

Monaco noted that the DOJ is also taking more cases to trial and delivering consequences for corporate recidivists, like stiffer penalties. To ensure the wrongdoers pay for their misconduct, the department is also providing a dollar-for-dollar credit to companies that claw back or withhold compensation from culpable employees.

During her keynote speech, Acting Assistant AG Nicole M. Argentieri highlighted that the Criminal Division is prioritizing the investigation and prosecution of the most complex financial crimes, bringing impactful cases across a range of industries, encouraging companies to invest in strong compliance programs, and holding corporate executives and other culpable individuals to account, as well. Over the past two years, the Fraud Section tried a record number of white-collar cases, demonstrating its commitment to holding gatekeepers accountable. In 2023, roughly one-quarter of the 250-plus individuals charged by Criminal Division prosecutors in white-collar cases were corporate executives, lawyers, or medical professionals who are trusted to set an organization's tone and culture.

To entice additional self-reporting of corporate wrongdoing, the DOJ plans to launch a pilot program to pay monetary rewards to non-culpable whistleblowers later in 2024. Under the program, any individual who helps the department discover significant corporate misconduct could qualify for a portion of the resulting forfeiture. The department is particularly interested in:

- Criminal abuses of the U.S. financial system;
- Foreign corruption cases outside the SEC's jurisdiction, including violations of the FCPA by non-issuers and violations of the FEPA; and
- Domestic corruption cases.

While many of the specifics remain unclear, the program will be reserved for individuals who voluntarily submit original, non-public, accurate information previously unknown to the department and when there are no other federal financial incentives for whistleblowers. To ensure the DOJ focuses resources on the most important cases, Argentieri previewed an expected monetary threshold below which an individual would not be eligible for the program. In addition, the whistleblower payments will only be provided after victims have been compensated.

Although the program is expected to result in an increase in corporate criminal investigations, it could significantly impact how federal prosecutors pursue white-collar crime and how corporate defense attorneys assess their exposure. It is also anticipated that the program will pave the way for defendants to demand discovery of exculpatory information and cross-examine witnesses on their financial bias. With defense and whistleblower lawyers already flagging concerns and formulating a list of priorities, the DOJ will likely have to consider many thorny areas as it develops the pilot program.

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News of the pilot program came after U.S. Attorney Damian Williams unveiled in January a Whistleblower Pilot Program that's designed to proactively uncover criminal conduct in the Southern District of New York by encouraging individuals to voluntarily disclose information regarding criminal conduct undertaken by or through public or private companies involving fraud, corporate control failures, affecting market integrity, state or local bribery, or fraud relating to federal, state, or local funds. In exchange for their cooperation, the Manhattan U.S. attorney's office will enter into a non-prosecution agreement where certain conditions are met. The policy is expected to help bolster white-collar cases at the U.S. attorney's office amid an enforcement slump. Ismail Ramsey, the U.S. Attorney for the Northern District of California (NDCA), announced an identical program in March. However, the NDCA policy also includes criminal conduct relating to intellectual property theft and related violations.

Argentieri added that these are not the only innovations the DOJ is using to expand its white-collar practice. She noted that the Justice Manual was revised to codify that the department will handle cases brought under the FEPA the same way it investigates and prosecutes FCPA violations, with centralized supervision by the Fraud Section, working in partnership with U.S. Attorneys' Offices across the U.S.

As the global threat landscape changes rapidly, Monaco reiterated that the DOJ is also evolving to meet new and emerging threats from AI and other disruptive technologies. "Fraud using AI is still fraud. Price fixing using AI is still price fixing. And manipulating markets using AI is still market manipulation," she said. She warned that prosecutors will seek stiffer sentences where AI is deliberately misused to make a white-collar crime significantly more severe. They will also assess a company's ability to manage AI-related risks as part of its overall compliance efforts. To that end, Monaco directed the Criminal Division to incorporate the assessment of risks associated with these technologies into its Evaluation of Corporate Compliance Programs guidance.

In addition, the DOJ will pursue cases against foreign nationals who attempt to steal trade secrets from U.S. tech firms working on AI, Garland said. Just before he spoke, the department charged Linwei Ding, a Chinese national who helped Google develop software for its supercomputing data centers, with four counts of trade secrets theft for stealing the company's proprietary AI information with the intention of using it for his own startup in China.

Meanwhile, Assistant Attorney General Matthew G. Olsen highlighted that the National Security Division (NSD) has sharpened its focus on enforcing sanctions and export controls to combat national security threats. The division "more than doubled the number of prosecutors working on violations of sanctions, export control, and foreign agent laws" and recruited two veteran prosecutors to serve as its first-ever chief and deputy chief counsel for corporate enforcement, Olsen said. However, when it comes to enforcing critical national security tools like sanctions and export controls, Olsen noted that corporations are on the front lines. He warned that the NSD does not hesitate to hold corporations and their executives accountable when they break laws that protect national security.

SOURCES: Benesch, U.S. Department of Justice, Law.com, Bloomberg Law, U.S. Attorney's Office, Global Investigations Review

Benesch Insights

How DOJ's Safe Harbor Policy alters the calculus for M&A due diligence

If the safe harbor is the carrot to convince organizations to adopt effective M&A compliance plans, the stick is enhanced enforcement. In announcing the policy, the deputy attorney general stated that "[i]f your company does not perform effective due diligence or self-disclosure misconduct at an acquired entity, it will be subject to full successor liability for that misconduct under the law." To mitigate this risk, acquiring companies must:

- Conduct preliminary risk assessments to identify areas that may require enhanced diligence.
- Identify areas of misconduct by the target prior to closing the transaction.
- Prepare a plan for additional diligence, remediation and, (if appropriate) self-disclosure where misconduct is found.

As a practical matter, companies should be aware that pre-closing diligence may take longer, especially for sellers with significant international operations and assets.

M&A diligence from a compliance perspective is often focused on anti-corruption, sanctions, AML, and antitrust issues, but the new safe harbor policy is a DOJ-wide policy, meaning that it applies to all federal criminal conduct. This is potentially a double-edged sword; although a company can receive the benefits associated with self-disclosure for all federal criminal violations, it may enhance the risk that successor liability will attach to other potential compliance issues not typically part of the diligence process.

Marisa Darden
Chair

Matthew David Ridings
Partner

SOURCE: Benesch

Crypto rife with fraud, was the riskiest type of consumer scam in 2023

More than 80% of people targeted by investment scams, including those involving cryptocurrency, reported losing money last year, making them the riskiest scam type, according to the 2023 BBB Scam Tracker Risk Report. Although such scams had the second-highest median dollar loss at $3,800, many people lose much more than that in crypto scams, according to a CBS News national consumer investigative correspondent. While the unregulated $2.65-trillion crypto industry has proved lucrative for several investors, others have reported losing billions of dollars to scams or hacks.

TABLE 1
10 riskiest consumer scams in 2023

RANK		SCAM TYPE	BBB RISK INDEX	EXPOSURE*		SUSCEPTIBILITY		MEDIAN $ LOSS	
2023	2022			2023	2022	2023	2022	2023	2022
1	6/3	Investment/ cryptocurrency**	520.9	1.7%	0.7%/ 1.7%	80.4%	49.0%/ 60.5%	$3,800	$1,369/ $1,100
2	2	Employment	445.9	14.8%	9.6%	15.1%	15.1%	$1,995	$1,500
3	1	Online purchase	244.9	41.9%	31.9%	82.6%	74.0%	$71	$100

* *Exposure is limited by the nature of self-reporting; the percentage of those who reported to BBB Scam Tracker does not necessarily match the percentage of people in the full population who were targeted by scams.*

** *For this year's report, we combined cryptocurrency scams with investments scams. We did this because the majority of cryptocurrency scams involve investment scenarios.*

Google recently sued Yunfeng Sun and Hongnam Cheung, alleging they engaged in racketeering and violated the company's terms of service and other policies by misusing its app store to scam thousands of users through fake crypto investment apps. The tech giant claims the two Chinese nationals were involved in a "social engineering" scheme to lure users into giving them money through the apps, resulting in tens of thousands of dollars in losses per victim since 2019. Over the past four years, Google has disabled 87 fake apps from the alleged fraudsters.

The lawsuit came after SEC Chair Gary Gensler, who voted in favor of spot bitcoin ETFs, warned the wider crypto field "has challenges" and is "rife with abuses and fraud." He singled out the intermediaries that pool investors' digital assets without providing them with "the proper disclosures," saying he thinks this "puts the investing public at risk."

SOURCES: CBS News, BBB, Reuters, Yahoo Finance

U.S. companies face challenges in dealing with risks posed by global financial crime networks

As sanctions and reforms force financiers of global conflict further underground, managing financial crime and compliance risks is becoming increasingly complex for U.S. companies that operate globally, according to Infortal Worldwide executives Christopher Mason and Ian Oxnevad. With regulators planning to factor geopolitical risk into their enforcement agenda in 2024, these companies must reassess their compliance and operational strategies. To defend against inadvertently supporting global conflict through financial means, these companies also need to understand their business partners and customers. However, this is challenging because bad actors often conceal their illicit activities behind layers of shell companies.

SOURCE: Bloomberg Law

FinCEN seeks to drive compliance through enforcement

At the Puerto Rican Symposium of Anti-Money Laundering, FinCEN Director Andrea Gacki highlighted that the agency has addressed "some of the most significant gaps in the U.S. anti-money laundering/countering the financing of terrorism (AML/CFT) regime and exposed specific risk factors, trends, and typologies." She added that FinCEN is becoming increasingly active in the enforcement space and is strategically deploying its resources to increase enforcement. This includes implementing an Anti-Money Laundering and Sanctions Whistleblower Program, which awards those who voluntarily submit original information about certain violations of the Bank Secrecy Act or economic sanctions between 10% and 30% of penalties collected if their information leads to successful enforcement actions. While an online tip intake portal and other aspects of the program are still being developed, the program is receiving, reviewing, and sharing tips with FinCEN enforcement partners. As of Feb. 22, the agency had received more than 240 unique tips, many of which were highly relevant to many of Treasury's top priorities, Gacki said.

This comes as FinCEN faces criticism from bipartisan lawmakers over its delay in fully implementing the whistleblower award program. Sens. Chuck Grassley (R-Iowa), Elizabeth Warren (D-Mass.), and Raphael Warnock (D-Ga.) expressed concerns that the agency has yet to formalize rules for the program, including the types of claims that can be reported and eligibility rules for awards. It also has not established a dedicated, public website to receive tips. The senators suggested this delay is particularly acute amid recent geopolitical events, as whistleblowers could be reporting violations involving authoritarian regimes, including those in Iran and Russia, as well as those associated with terrorist groups.

SOURCES: Financial Crimes Enforcement Network, The Wall Street Journal

Fraud Section's total penalties fall below $1B for the first time since 2015

While the Fraud Section reached one more corporate resolution in 2023 (8) than in 2022 (7), total fines plunged 68% to $690 million, its lowest tally in at least eight years, according to a Reuters analysis of data from the agency's annual report. The decline was partly the result of a pandemic trial backlog that diverted resources from settlement negotiations. Deputy Assistant AG General Lisa Miller noted that settlements can take years to come to fruition due to the complex and global nature of the investigations. In addition, the FCPA unit-historically, a driver of record fines-brought fewer large cases.

The Fraud Section also secured fewer convictions at trial in 2023 (47) than in 2022 (56), but the analysis shows this is still historically high. Miller added that the DOJ unit remains confident in its pipeline and is innovatively leveraging data to expeditiously identify, dismantle, and prosecute fraud and foreign bribery schemes.

SOURCES: Reuters, U.S. Department of Justice

U.S. government, whistleblowers were parties to highest number of FCA settlements, judgments in single year in FY 2023

In the fiscal year ended Sept. 30, 2023, there were 543 False Claims Act settlements and judgments exceeding $2.68 billion. More than $1.8 billion is related to matters involving the healthcare industry, including managed care providers, hospitals, pharmacies, laboratories, long-term acute care facilities, and physicians. The DOJ was also instrumental in recovering additional amounts for state Medicaid programs. The recoveries reflect the department's focus on key enforcement priorities, including fraud in pandemic relief programs.

SOURCE: U.S. Department of Justice

Most financial institutions in U.S., Canada looking for ways to slash financial crime compliance costs after annual total climbs to $61B

The majority (70%) of financial institutions in the U.S. and Canada are concentrating on cost reduction after the costs to comply with financial crime regulations increased for 99% of financial institutions of all sizes, according to a study commissioned by LexisNexis Risk Solutions. The escalation of financial crime regulations and regulatory expectations was identified as the primary factor driving the increase by 44% of those surveyed. As a result, LexisNexis Risk Solutions advises that these organizations take a strategic approach to financial crime compliance. It recommends:

- Seeking ways to slash labor costs while simultaneously improving compliance efficiency;
- Proactively incorporating comprehensive data sets, advanced AI/machine learning-based compliance models, and robust analytics within their financial crime compliance solutions to quickly identify new crime patterns; and
- Actively countering cybercriminals exploiting AI, cryptocurrencies, and digital channels.

SOURCE: LexisNexis Risk Solutions

U.S. Supreme Court rules whistleblowers not required to prove 'retaliatory intent'

Companies in several industries will find it harder to defend themselves from allegations they retaliated against whistleblowing employees after the U.S. Supreme Court held that a whistleblower who invokes the Sarbanes-Oxley Act only bears the burden to prove the protected activity was a contributing factor in the employer's decision to fire or discriminate against them. If the employee meets this standard, the burden of proof shifts to the employer, which would have to provide evidence that it would have fired the employee even absent the protected whistleblowing activity.

The unanimous decision, which reinstated a $900,000 jury verdict won by a fired UBS Group research strategist, reversed a 2022 Second Circuit ruling requiring the plaintiffs to meet that higher burden of proof to win a whistleblower retaliation claim. This is seen as a significant victory for whistleblowers who have brought cases under more than a dozen federal whistleblower laws that have a similar burden of proof for retaliation.

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Those laws cover federal employees, as well as private sector areas like transportation, food safety, product safety and the consumer financial board.

This lower burden of proof is significant compared to the higher "motivating factor" standard used in other discrimination contexts, such as under Title VII of the Civil Rights Act. The court emphasized that Congress intentionally designed the Sarbanes-Oxley Act's burden-shifting framework to make it easier for whistleblowers to succeed in their claims, thereby encouraging the reporting of corporate misconduct.

SOURCE: Bloomberg Law

Marisa Darden
Chair

Our Take:
Employers must now be even more diligent in documenting and justifying their employment decisions, especially when they involve employees who have engaged in protected whistleblowing activities. Companies should review and potentially strengthen their compliance and whistleblower protection policies to mitigate the risk of litigation and substantial jury awards. The Supreme Court's decision is a powerful affirmation of the protections afforded to whistleblowers and will likely influence the interpretation of other federal whistleblower statutes with similar language.

Number of enforcement actions against global financial institutions reached rarely-seen levels in U.S. in 2023

A SteelEye analysis of the monetary penalties issued in 2023 by the U.S. SEC, CFTC, and other financial regulators around the world shows activities like insider trading, market manipulation, and anti-money laundering breaches are drawing additional scrutiny and fines. SteelEye found:

- The SEC and CFTC issued a combined $9.2 billion in penalties, including 32 fines for insider trading alone.
  - The $4.3 billion in penalties levied by the CFTC was a record for the agency.
  - The SEC filed 784 enforcement actions in 2023, 3% more than in 2022, while the 96 enforcement actions filed by the CFTC also increased 17%, indicating both agencies are cracking down on smaller firms.
- The total number of fines imposed by the U.K.'s Financial Conduct Authority dropped for the first time in seven years to eight, compared to 26 in 2022 and 10 in 2021, while the total value also declined by 75% to £52.8 million.
- Germany's Federal Financial Supervisory Authority and Federal Office of Justice issued a total of 40 fines, down 13% from 46 in 2022.
- France's AutoritÈ des marchÈs financiers fined firms Ä127.9 million, a 34.5% increase in comparison to 2022. Two of those penalties cited insider trading.
- The Netherlands' Authority for the Financial Markets issued six fines worth Ä17.4 million, a significant increase compared to the Ä903,000 issued in 2022.

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- The Monetary Authority of Singapore fined four banks and an insurer for breaches of AML requirements and a tier-one investment bank for misconduct by its relationship managers. The penalties totaled S$7.7 million.

Although the penalties in Europe did not match the levels of those handed down in the U.S., SteelEye is anticipating fines in Europe will be higher in 2024.

SOURCES: SteelEye, Corporate Compliance Insights

2024 poised to show how DOJ's corporate crime initiatives are manifesting in practice

Although it will take well more than 12 months to define the legacy of the DOJ's efforts to crack down on corporate criminals, 2024 is still expected to flesh out the types of cases prosecutors are able to bring pursuant to policy shifts. Bloomberg Law highlights four developments to watch as signs of whether the crackdown is working:

- The DOJ is expected to bring many more high-profile prosecutions of individuals in 2024 after a guilty plea by Binance CEO Changpeng Zhao in November 2023 signaled that the department is serious about punishing executives for their companies' misdeeds. Although Zhao was recently sentenced to just four months in prison-significantly less time than the three years sought by prosecutors—U.S. Attorney Tessa Gorman said they are pleased with the results, as incarceration was critical in the case.
- After trumpeting its interest in investigating cases at the intersection of national security concerns, the DOJ is also expected to bring some significant cases for violations of trade sanctions, export controls, and anti-money laundering laws.
- 2024 will present further opportunities for the DOJ to show that its use of data analytics to uncover overseas bribery and other crimes is more than just a talking point to encourage company disclosures.
- Although the department's corporate enforcement is typically more insulated from the pressure of an election year, there may be a greater sense of urgency to wrap up politically sensitive cases or white-collar matters that are not run-of-the-mill because a different administration could have dissimilar views.

SOURCES: Bloomberg Law, Reuters

Regulatory Developments

Benesch Insights

The "China Initiative" just won't die—recent DOJ settlement highlights the lasting effect of Trump-era policy on health care institutions

In 2022, the United States Department of Justice ("DOJ") announced its decision to shut down the "China Initiative"-the controversial program used to investigate and prosecute academics, health care workers, and businesspeople for failing to disclose ties to the Chinese government. A recent DOJ settlement involving a research hospital indicates, however, that although the China Initiative is ostensibly dead, health care and research institutions may be feeling its effects for years to come.

There are a number of takeaways from this settlement. First, despite the change in administration, DOJ is still actively pursuing researchers and their employers over the failure to disclose ties to China. Second, although scrutiny on individual doctors and researchers may be lessening, institutions that seek research grants and funding from the government are still squarely within the government's crosshairs. Research institutions must scrutinize the financial ties and affiliations of their researchers when applying for federal grant funds and ensure that any application is scrupulous and accurate in every detail. Finally, research institutions should consult experienced counsel well-versed in these issues.

Marisa Darden
Chair

Matthew David Ridings
Partner

Parth Patel
Associate

SOURCE: Benesch

CFTC probes whether large banks restrict whistleblowing in NDAs in swaps, clearing businesses

The CFTC asked JPMorgan, Bank of America, Citigroup, and other large Wall Street banks to hand over employment and customer agreements in their swaps and clearing businesses. The derivatives regulator is looking into whether the non-disclosure agreements (NDAs) include language that suppresses would-be whistleblowers or fails to make clear that wrongdoing can be reported to the CFTC. The investigation expands on similar government probes targeting other companies for allegedly using NDAs to discourage employees or clients from reporting violations.

SOURCE: Bloomberg

Regulatory Developments (cont'd)

Criminal Division's Voluntary Self-Disclosures Pilot Program for Individuals

To reinforce the DOJ's existing corporate voluntary self-disclosure program and planned whistleblower program, the Criminal Division launched a Pilot Program on Voluntary Self-Disclosures for Individuals. Deputy Assistant AG Nicole M. Argentieri says the program will provide clear incentives to the first person to report misconduct, which will put pressure on everyone-including companies-to disclose misconduct as soon as it is discovered. The program includes many of the same parameters as the Whistleblower Pilot Programs that the U.S. Attorney's Offices for the Southern District of New York and the Northern District of California rolled out to entice individual tipsters. But contrary to the SDNY and NDCA versions, the Criminal Division offers more details on the types of corporate wrongdoing it is trying to uncover.

Under the program, certain individuals with criminal exposure will be eligible to receive a non-prosecution agreement (NPA) if they:

- Voluntarily, truthfully, and completely self-disclose original information to the Criminal Division regarding misconduct in certain high-priority enforcement areas that was otherwise unknown to the DOJ;
- Fully cooperate and provide substantial assistance against those equally or more culpable;
- Forfeit any ill-gotten gains and compensate victims; and
- Do not have a preexisting obligation to report the information.

The program seeks disclosures in certain core enforcement areas, including:

- Schemes involving financial institutions, such as money laundering and criminal compliance-related schemes;
- Schemes related to the integrity of financial markets involving financial institutions, investment advisors or funds, or public or large private companies;
- Foreign corruption schemes, including violations of the FCPA, FEPA, and associated money laundering;
- Healthcare fraud and kickback schemes;
- Federal contract fraud schemes; and
- Domestic corruption schemes involving bribes or kickbacks paid by or through public or private companies.

The program is not available to CEOs, CFOs, high-level foreign officials, domestic officials of any level, or individuals who organized or led the criminal scheme, engaged in certain types of criminal conduct, or have a prior felony conviction or any conviction involving fraud or dishonesty.

SOURCES: U.S. Department of Justice, Bloomberg Law

Regulatory Developments (cont'd)

California bill would increase fines for corporate criminals

AB 2432, introduced by state Assemblymembers Jesse Gabriel (D-Encino) and Eloise Gómez Reyes (D-Colton), would increase fines for corporations convicted of crimes, which are currently capped at $10,000 for each felony. Under the bill, the limit would be increased to twice the amount taken from a victim by a guilty corporation or twice the amount lost by a victim. All money would go to the California Crime Victims Fund, which would pay for victim service programs. The measure would also increase restitution fines from $10,000 to $100,000, 75% of which would go to the fund, while the remaining 25% would go to the prosecuting agency that brought the charges. The bill's authors and others said the measure is needed as a result of an expected $170 million drop in federal funding for victim services.

SOURCE: Courthouse News Service

Related: Congresswoman Ann Wagner, colleagues introduce legislation to stabilize Crime Victims Fund—**Congresswoman Ann Wagner**

Treasury report outlines next steps to address AI-related fraud issues, other challenges in financial services sector

At the direction of President Joe Biden's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, the Treasury Department released a report that identifies significant opportunities and challenges AI presents to the security and resiliency of the financial services sector. Although the report does not impose any requirements, it outlines the following next steps to address immediate AI-related challenges:

- **Addressing the growing capability gap**. There is a widening gap between large and small financial institutions when it comes to in-house AI systems.
- **Narrowing the fraud data divide.** There is a gap in the data available to financial institutions for training models. This gap is significant in the area of fraud prevention, where there is not enough data sharing among firms.
- **Regulatory coordination.** There are concerns about regulatory fragmentation as different financial sector regulators at the state, federal, and international levels consider AI regulations.
- **Expanding the NIST AI Risk Management Framework** to include more applicable content on AI governance and risk management related to the financial services sector.
- **Best practices for data supply chain mapping and "nutrition labels,"** which would clearly identify what data was used to train the model, where the data originated, and how any data submitted to the model is being used.
- **Explainability for black-box AI solutions.** In the absence of these solutions, the financial sector should adopt best practices for using generative AI systems that lack explainability.
- **Gaps in human capital.** A set of best practices for less-skilled practitioners on how to use AI systems safely would help manage the substantial AI workforce talent gap. In addition, role-specific AI training for employees outside of IT can help educate the teams managing AI risks.

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Regulatory Developments (cont'd)

- **A need for a common AI lexicon.** This would greatly benefit financial institutions, regulators, and consumers, as there is a lack of consistency across the sector in defining what "artificial intelligence" is.
- **Untangling digital identity solutions.** Although they can help financial institutions combat fraud and strengthen cybersecurity, robust digital identity solutions differ in technology, governance, and security and offer varying levels of assurance.
- **International coordination.** The Treasury will continue to engage with foreign counterparts on the risks and benefits of AI in financial services.

SOURCE: U.S. Department of the Treasury

SEC's follow-on administrative enforcement proceedings are unconstitutional, NCLA says

These proceedings, which usually account for more than 20% of the hundreds of enforcement cases prosecuted by the SEC each year, have numerous constitutional problems, writes Russell G. Ryan, senior litigation counsel with the New Civil Liberties Alliance (NCLA). He explains that federal law allows the agency to bar or suspend securities industry participants if they have been convicted of certain crimes, restrained from engaging in certain financial activity due to a court injunction, or barred or suspended by a state securities regulator for fraudulent misconduct. However, the SEC must also find that a bar or suspension is in the public interest by weighing factors such as the nature of the misconduct, the wrongdoer's degree of intentionality, and the likelihood of repetition. Ryan argues that the SEC has no business deciding cases or controversies, as that role is vested exclusively in federal courts with real judges and juries under Article III of the U.S. Constitution. As a result, he says these proceedings are particularly vulnerable to a constitutional challenge that cannot come soon enough.

SOURCE: Bloomberg Law

U.S., 10 other countries agree to work together to combat fraud

A communiqué endorsed by the U.S., U.K., Canada, Australia, France, Germany, Italy, Japan, New Zealand, South Korea, and Singapore sets out a four-point framework for tackling fraud, which has become one of the most prevalent crimes globally. The nations committed to:

- **Building international understanding, partnerships, and capabilities.** This includes building on the G7 Declaration on Enhancing Cooperation in the Fight against Transnational Organized Fraud, developing and maintaining a detailed knowledge of the constantly changing threat, and strengthening their individual understanding of the types, volumes, and origins of fraud taking place in their jurisdictions.
- **Strengthening multilateral partnerships and growing capabilities.** This includes strengthening victim support by raising public awareness and equipping citizens with tools to recognize, reject, and report fraudsters' tactics. This also includes retrieving the proceeds of fraud from criminals and returning them to victims, wherever possible.

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Regulatory Developments (cont'd)

- **Pursuing organized fraudsters acting transnationally.** This includes increasing data and intelligence sharing, strengthening coordination of law enforcement operations in mutual threat areas, exploring further avenues to bolster collaboration, sharing international best practices, and delivering capability and capacity-building initiatives.
- **Preventing the reach and means of fraudsters.** This includes strengthening government and industry engagement. The industry, including social media companies and online messaging platforms, is expected to take further action to prevent fraud and increase efforts to identify and remove fraudulent posts.

Separately, the U.S. and U.K. entered a new operational arrangement to fight call center fraud specifically.

SOURCE: U.K. Government

Future of beneficial ownership regime cast into doubt after U.S. judge rules CTA is unconstitutional

U.S. District Judge Liles C. Burke ruled the bipartisan Corporate Transparency Act (CTA), which was the most significant update to U.S. anti-money laundering law in a generation, exceeds the U.S. Constitution's limits on Congress and lacks a clear enough case to be supported on national security grounds. Although the Treasury Department is complying with the Alabama federal court's injunction barring it from enforcing the CTA against the named plaintiffs, it promptly appealed the ruling. Ian Gary, executive director of the FACT Coalition, argues the order should be stayed and overturned, as it "undermines the rule of law and allows criminals to use anonymous shell companies to hide their dirty money from law enforcement." Zorka Milin, policy director at the coalition, contends the decision is mistaken on both the Constitution and AML law. She warns the ruling, if applied more broadly, would hobble critical AML efforts, and have troubling constitutional implications for the scope of congressional powers that could reach far beyond the CTA.

While the ruling's ultimate impact on the nascent beneficial ownership reporting regime is presently unknown, it could open the door for other businesses to bring their own legal challenges in hopes of escaping the requirements. However, appeals could take years, leaving businesses unsure of how to proceed.

SOURCES: Thomson Reuters, Bloomberg Law

FinCEN proposes rules to close money laundering loopholes in investment adviser, real estate markets

The Treasury Department took a historic step toward closing long-standing loopholes used by foreign and domestic criminals to launder money by proposing a pair of rules targeting sectors that have been largely excluded from anti-money laundering requirements for decades, according to the FACT Coalition.

To keep criminals and foreign adversaries from exploiting the U.S. financial system and assets through investment advisers, FinCEN proposed a rule that would add investment advisers to the list of businesses classified as "financial institutions" under the Bank Secrecy Act (BSA). Under the proposed rule, investment advisors registered with the SEC and those that report to the SEC as exempt reporting advisers would be required to implement Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT)

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Regulatory Developments (cont'd)

programs, file suspicious activity reports, fulfill certain recordkeeping requirements, and meet other obligations applicable to financial institutions subject to the BSA and FinCEN's implementing regulations.

To combat and deter money laundering in the U.S. residential real estate sector, FinCEN also proposed a rule that would require certain professionals involved in real estate closings and settlements to report information about non-financed transfers of residential real estate to legal entities or trusts. The proposed rule is tailored to target residential real estate transfers considered to be high-risk for money laundering while minimizing potential business burden.

A wide range of stakeholders, including U.S. senators, state AGs, and affordable housing, national security, and anti-corruption groups, praised the proposed rules but recommended strengthening them by extending these AML safeguards to commercial real estate purchases. As a result, FinCEN intends to release a separate rule to counter money laundering in the U.S. commercial real estate market later this year.

SOURCES: Financial Crimes Enforcement Network, FACT Coalition, Attorney General Rob Bonta

Post-Secondary Education & NCAA – Title IX, NIL

NCAA's Division I Board of Directors ratifies NIL reforms, seeks feedback on women's basketball fund

Division I student-athletes who disclose name, image, and likeness agreements to their schools now have access to additional school assistance with NIL activities after the Division I Board of Directors affirmed the actions recently taken by the Division I Council. Under a rule recently adopted by the council, member schools will be able to increase NIL-related support for student-athletes, including identifying NIL opportunities and facilitating deals between student-athletes and third parties, beginning Aug. 1. To receive such support, student-athletes must disclose information related to any NIL activity valued at $600 or more to their schools no later than 30 days after entering or signing the NIL agreement. However, schools can implement their own policies to best secure disclosures and provide a reasonable grace period for student-athletes who do not report within the 30-day period. Existing prohibitions against pay-for-play and schools compensating student-athletes for the use of their NIL remain in place.

The Division I Council also adopted a package of rules changes to allow transferring student-athletes who meet certain academic eligibility requirements to be immediately eligible at their new school, regardless of whether they transferred previously.

This comes after the board ratified in January the council's decision to adopt NIL student-athlete protections, including a national NIL education program, recommended best practices for NIL agreements, mandatory disclosure requirements, and a new registry for NIL service providers. More recently, Teamworks was

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

selected by the NCAA to build and maintain a registration process for agents and other professional service providers offering NIL services and make that registry available to student-athletes. The software company will also develop a process to collect disclosures of NIL activities and create and provide educational materials to all NIL stakeholders.

Meanwhile, the Board of Directors Finance Committee plans to seek membership feedback on key questions relating to the targeted distribution amount, structure, and source of funding for the women's basketball fund. To meet its goal of making an initial payout in the 2025-2026 fiscal year based on performance in the 2024-2025 Division I Women's Basketball Championship, the committee is aiming to hold the Division I membership vote on a proposal to create the fund at the NCAA Convention in January 2025. The committee also supported making permanent a two-year pilot program that allowed 50% seeding for the women's volleyball and women's soccer championships.

SOURCE: NCAA

Biden administration sued over final Title IX regulations that extend LGBTQ+ student protections

The U.S. Department of Education released its long-awaited final rule to amend the regulations implementing Title IX to better align the regulatory requirements with the law's nondiscrimination mandate. The final rule:

- Protects against all sex-based harassment and discrimination, including by restoring and strengthening full protection from sexual violence and other sex-based harassment;
- Promotes accountability and fairness by requiring schools to take prompt and effective action to end any sex discrimination in their education programs or activities, prevent its recurrence, and remedy its effects; and
- Empowers and supports students and families by protecting against retaliation for students, employees, and others who exercise their Title IX rights.

The final rule will take effect on Aug. 1, 2024, and apply to complaints of sex discrimination regarding alleged conduct that occurs on or after that date.

Five states initiated what is anticipated to be a litany of legal challenges when they filed two separate but similar lawsuits—the firsts of their kind-as they seek to block the final rule in the short and long term. The lawsuit filed by Texas claims the Department of Education is attempting to effect social change in U.S. schools by interpreting Title IX to include protections for LGBTQ+ students. The second lawsuit was filed by Alabama, Florida, Georgia, South Carolina, and several conservative civil rights organizations on behalf of college athletes and parents who also take issue with the rule's inclusion of LGBTQ+ students. Both lawsuits allege the department exceeded its authority in finalizing the rule and violated multiple federal provisions, including Title IX itself and a spending provision under the U.S. Constitution that allows federal funding to be conditional. Louisiana, Mississippi, Montana, and Idaho filed a similar lawsuit over the final rule, while Kentucky, Tennessee, Indiana, Ohio, Virginia, and West Virginia echoed many of the same claims in their complaint. Meanwhile, South Dakota Gov. Kristi Noem (R) and AG Marty Jackley said the state will not stand

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

for the dismantling of Title IX and "will see President [Joe] Biden in court." Jackley warned that the Biden administration is undermining Title IX's major achievement of giving young people an equal opportunity to participate in sports.

However, the Department of Education's rulemaking process for Title IX regulations relating to athletics remains ongoing as it carefully considers the more than 150,000 public comments that it received on its proposed amendments to the rules. As proposed, the regulations would outlaw blanket state bans but outline how schools can prohibit transgender athletes from competing in certain circumstances, particularly in competitive sports.

SOURCES: U.S. Department of Education, K-12 Dive, South Carolina Daily Gazette, Higher Ed Dive, South Dakota State News, The Washington Post

Virginia becomes first state to allow schools to pay student-athletes

The University of Virginia, Virginia Tech, and James Madison University were given the upper hand on the recruiting trail when Gov. Glenn Youngkin (R) signed a bill that will allow a public or private institution of higher education in the commonwealth to compensate student-athletes for their name, image, and likeness, starting July 1. Although student-athletes cannot be paid for their athletic performance, they can receive university dollars for marketing campaigns. The law also makes it illegal for the NCAA to punish a school for paying athletes for their NIL rights. The move could serve as a catalyst for other states to follow suit and will likely expedite the timeline of changes to the NCAA's NIL rules.

The Virginia law joins a patchwork of some 30 state NIL laws that have created chaos in college sports. This patchwork of state laws has resulted in lawsuits challenging the NCAA's ability to crack down on certain recruitment practices and made business dealings at the college level more confusing.

SOURCES: Axios, Sports Illustrated, NBC News

University of Central Oklahoma agrees to resolve Title IX claims over unfair treatment of female student-athletes

In a massive win for all women at the school, the University of Central Oklahoma (UCO) reached a proposed settlement in a lawsuit alleging it violated the Title IX rights of athletes on its women's track and cross-country teams by not giving them the same benefits or rights as men's teams. The class action also claimed the university retaliated against the female student-athletes for seeking equal treatment. Under the proposed settlement, UCO agreed to make immediate changes to its women's track and cross-country teams, hire a gender equity specialist to conduct thorough reviews, and file Title IX reports for years to come.

SOURCE: KOCO

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

NAIA believed to be first college sports organization to all but ban transgender athletes from women's sports

A transgender participation policy approved by the National Association of Intercollegiate Athletics (NAIA) Council of Presidents states that only athletes whose biological sex assigned at birth is female and who have not begun hormone therapy may participate in NAIA-sponsored female sports. A student who has started hormone therapy may participate in workouts, practices, and other team activities but not in intercollegiate competitions. However, the policy says all athletes may participate in NAIA-sponsored male sports and competitive cheer and dance, which are co-ed. The policy notes that every other sport "includes some combination of strength, speed, and stamina, providing competitive advantages for male student-athletes."

SOURCE: The Associated Press

California lawmakers introduce slate of bills to combat sexual discrimination, harassment in higher education

To address and prevent sex discrimination and harassment on college and university campuses in the state, lawmakers introduced a package of a dozen bills that will serve as a crucial step in creating a system of compliance and oversight that will increase transparency and accountability. The bills are as follows:

- AB 810 would require all public colleges and universities to use a University of California, Davis policy to conduct employment verification checks to determine if a job applicant for any athletic, academic, or administrative position has any substantial misconduct allegations from their previous employer.
- AB 1790 would require California State University to implement recommendations made in a Title IX report conducted by the California State Auditor by Jan. 1, 2026.
- AB 1905 would create parameters around employee retreat rights, letters of recommendation, and settlements for administrators who have a substantiated sexual harassment complaint against them.
- AB 2047 would create an independent, statewide Title IX office to assist UC, CSU, and California Community Colleges systems with Title IX monitoring and compliance and create a statewide Title IX coordinator.
- AB 2048 would require each UC and CSU campus, as well as each CCC district, to have an independent Title IX office.
- AB 2326 would create entities responsible for ensuring campus programs are free from discrimination and require UC, CSU, and CCC to annually present to the legislature how their systems are actively preventing discrimination.
- AB 2407 would require the California State Auditor to conduct an audit every three years on the ability of the UC, CSU, and CCC systems to address and prevent sexual harassment on their campuses.
- AB 2492 would create additional positions on college campuses to assist students, faculty, and staff during the adjudication of sexual harassment complaints.

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

- AB 2608, which would require campuses to offer drug-facilitated sexual assault prevention training.
- AB 2987 would mandate that CSU and CCC provide timely updates on the outcomes of sexual discrimination and harassment cases to the people involved. UC would be requested to do the same.
- SB 1166 would establish annual reporting requirements relating to the prevention of discrimination. The CSU and CCC would be required to provide a report on sexual harassment complaint outcomes and summarize how each campus worked to prevent sex discrimination. UC would be asked to do the same.
- SB 1491 would create a notification process for students who attend private institutions to disclose discriminatory events to the U.S. Department of Education, even if their college or university is exempt from Title IX.

The 12-bill package follows a February report detailing significant deficiencies in the three systems' handling of Title IX cases.

SOURCE: KQED

NCAA's transgender policies violate Title IX, Fourteenth Amendment, lawsuit alleges

More than a dozen current and former collegiate female athletes claim the NCAA "serially violated Title IX by purposefully adopting and amending policies" to allow transgender athlete Lia Thomas to compete with the UPenn women's swim team during NCAA competitions. They further allege the organization violated the Equal Protection Clause of the Fourteenth Amendment "by treating women unequally in comparison to men, depriving women of competitive opportunities equal to those afforded men, and violating women's right to bodily privacy." The plaintiffs are seeking a court order enjoining the NCAA from enforcing or implementing its transgender eligibility rules and requiring it to invalidate and revise all records and titles that were based on the results of competitions that permitted participation from transgender athletes.

SOURCE: CNN

Bribery & Foreign Corrupt Practices Act

SEC's FCPA unit inquires about tech companies' relationships with contractors

As part of an enforcement sweep, the SEC's FCPA unit is reportedly asking companies across the tech supply chain that sell equipment and/or services to governments about their relationships with distributors and other business partners outside the U.S. As part of the early-stage inquiry, the unit is questioning whether the companies did business with dozens of intermediaries—some of which have been implicated in other investigations—across Asia, Latin America, Africa, and other regions. The companies have not been identified, nor have they been accused of wrongdoing.

SOURCE: Bloomberg

DOJ obtains $1.7B in fines in FCPA sweep involving international commodities trading companies in Latin America, Africa

Through its long-running investigation into international commodities trading companies that paid bribes to win business with state-owned and state-controlled oil companies in Latin America and Africa, the DOJ's Criminal Division entered into corporate resolutions with Sargeant Marine, Vitol, Glencore International, Freepoint Commodities, Gunvor, and Trafigura. The corporate resolutions included mandatory cooperation, disclosure, and compliance obligations and resulted in aggregate fines, forfeitures, and other penalties of more than $1.7 billion. These corporate resolutions are also connected to the guilty pleas of 19 culpable individuals, including six government officials, eight corrupt intermediaries, and five trading company employees. In addition, former Vitol trader Javier Aguilar has been convicted on FCPA and money laundering charges.

The penalties and agreements resulting from the investigation, which began in 2017, show the value the DOJ places on cooperation. The companies that cooperated received fine reductions of up to 25%, while two secured deferred prosecution agreements. Among the companies that received cooperation credit was Gunvor, which agreed to pay a criminal monetary penalty of nearly $374.6 million and to forfeit $287.1 million in ill-gotten gains after pleading guilty to a corrupt scheme to pay substantial bribes to Ecuadorean government officials to secure business with state-owned and state-controlled oil company Petroecuador. The DOJ imposed a larger fine and required ongoing compliance in at least one case where it was not satisfied with the level of cooperation.

SOURCES: U.S. Department of Justice, Compliance Week

Bribery & Foreign Corrupt Practices Act

Benesch Insights

SCOTUS Rules Federal Bribery Law Does Not Criminalize Gratuities

The Supreme Court ruled that the federal anti-bribery statute does not make it a crime for state and local officials to accept a gratuity for acts taken in the past. In a 6-3 ruling in *Snyder v. United States*, the Court reversed the bribery conviction of former Indiana Mayor James Snyder under 18 U.S.C. § 666, which prohibits "corruptly" soliciting or accepting anything of value with the intent of being "influenced or rewarded." Writing for the majority, Justice Brett Kavanaugh, in no uncertain terms, explained that "§666 leaves it to state and local governments to regulate gratuities to state and local officials" rather than "subjecting 19 million state and local officials to up to 10 years in federal prison for accepting even commonplace gratuities."

What, then, does Snyder mean for local officials, as well as those who work in and closely with governments? Well, contrary to many of the day-of headlines, bribery remains entirely illegal. State officials may not "corruptly" solicit, accept, or agree to accept "anything of value" with the intent of being influenced or rewarded in connection with "any official business or transaction worth $5,000 or more." In other words, § 666 still criminalizes bribes, and other statutes still criminalizes after-the-fact gratuities under a reward theory.

The most important question left open by this decision, in our view, is what it means to act "corruptly." While not necessarily raising it to the level of strict liability, we have noticed a trend in recent § 666 prosecutions of essentially charging a transfer of anything of value, however de minimis, coupling it with the performance of an official duty, and then basically presuming corrupt intent. With the clarification this decision brings, it seems possible that proof of corrupt intent will become the central focus in many of these cases. We may see that the field has been leveled and the likelihood that only those who engaged in intentional criminal wrongdoing will be punished. Indeed, there are no shortage of pending, politically important prosecutions that have charged § 666 violations under pre-Snyder theories. Whether through case-dispositive motions and rulings, arguments over jury instructions, and the like, the prospect of conviction is at least somewhat more tenuous.


Mark Silberman
Partner


Ryan Levitt
Of Counsel


Allyson Cady
Managing Associate

SOURCE: Benesch

Bribery & Foreign Corrupt Practices Act (cont'd)

German software company gets 40% penalty discount for FCPA violations despite rap sheet

Less than three years after entering into a non-prosecution agreement for violating export and sanctions laws related to Iran, SAP entered into a three-year deferred prosecution agreement with the DOJ concerning schemes to pay bribes to government officials in South Africa and Indonesia, in violation of the FCPA. Pursuant to the DPA, the German software company will pay a criminal penalty of $118.8 million and administrative forfeiture of nearly $103.4 million. This represents a 40% penalty discount-near the maximum reduction available for companies that do not voluntarily self-disclose, said Acting Assistant AG Nicole M. Argentieri. This signals that even recidivists can benefit from meaningful cooperation. SAP also avoided an independent compliance monitor and will escape indictment if it adheres to the terms of the three-year deal. The fact that the DOJ did not obtain a guilty plea from SAP came as a surprise in light of Deputy AG Lisa Monaco's 2022 statement disfavoring successive DPAs or NPAs with the same company.

Argentieri highlighted that the resolution with SAP illustrates how the DOJ is implementing three recent features of its revised policies: the Corporate Enforcement and Voluntary Self-Disclosure Policy (CEP), the department's consideration of corporate recidivism, and the Criminal Division's Compensation Incentives and Clawbacks Pilot Program.

SOURCES: U.S. Department of Justice, Bloomberg Law

Fraud, Embezzlement & Insider Trading

Benesch Insights

From the NBA Finals to Federal Prison—"Big Baby" Sentenced to 40 months in NBA Healthcare Plan Scheme

Former NBA player Glen "Big Baby" Davis was sentenced to 40 months in prison after being convicted for his role in a scheme to defraud the NBA healthcare plan. Davis' sentence comes almost a year after the scheme's ringleader, former New Jersey Nets player Terrance Williams, was sentenced to 10 years in prison for the over $5 million fraud. Davis, who played for the 2008 Boston Celtics championship team, submitted false medical claims totaling $132,000. Manhattan U.S. District Court Judge Valerie E. Caproni emphasized the severity of his actions, including recruiting others to the scheme and failing to comply with pre-trial conditions. Davis' and his co-defendants' sentences highlight the broad range of healthcare fraud cases the government is willing to pursue. While the government has particular incentive to investigate and punish large frauds against public payors like Medicare, it remains vigilant to relatively smaller frauds against private payors. These sentences further highlight the government's willingness to pursue not just ringleaders but low-level participants as well.

Bianca Smith
Associate

Parth Patel
Associate

SOURCE: Benesch

Jury sides with SEC in first-ever 'shadow' insider trading case

In the latest test of insider trading law, a San Francisco federal jury agreed with the SEC that former Medivation executive Matthew Panuwat engaged in insider trading when he used non-public information about his company to place bets on a rival stock. Within minutes of receiving an email from the CEO at Medivation saying Pfizer was interested in acquiring the biopharmaceutical company, Panuwat purportedly spent more than $117,000 on call options in rival Incyte. Attorneys for Panuwat, who allegedly made $120,000 on the trades, argued that the trades were not based on confidential information because the press covered the merger. This was the SEC's first enforcement action targeting "shadow" trading, a widespread phenomenon that has gone largely unchecked. The jury verdict significantly expands what counts as insider trading and could have broad implications for professional traders and ordinary investors.

SOURCES: Bloomberg, The Wall Street Journal, MarketWatch

Fraud, Embezzlement & Insider Trading (cont'd)

IRS brings first standalone criminal charges for crypto tax fraud

In a sign it is serious about cracking down on tax crimes in the crypto space, the IRS charged Frank Richard Ahlgren III with underreporting or failing to report the sale of $4 million worth of bitcoin in 2017 and 2019 and the substantial capital gains that came from those sales. This marked the first time an individual was charged "solely for failing to report or underreporting cryptocurrency earnings and gains on their tax return," the agency said. This comes as the IRS continues to invest in understanding the crypto space as it ramps up enforcement and rulemaking. Since proving crypto tax fraud can be challenging and requires extensive technical resources and expertise, the agency recently recruited two private industry crypto experts—Sulolit "Raj" Mukherjee, formerly of Binance.US and Consensys, and Seth Wilks, formerly of TaxBit.

SOURCE: Bloomberg Law

Public Corruption

Senate committee passes bipartisan bill that would combat public corruption

The Senate Foreign Relations Committee passed the International Freedom Protection Act, which would modernize and enhance U.S. tools, strategies, and approaches to combatting authoritarianism and defending democracy abroad. Among other provisions, the bipartisan bill would:

- Establish in law a mandatory visa ineligibility for foreign government officials involved in gross violations of human rights and significant acts of public corruption; and
- Combat corruption and kleptocracy by expanding the Rewards for Justice program to allow the State Department to provide rewards for information related to tracking down ill-gotten gains from corruption.

SOURCE: Senate Foreign Relations Committee

DOJ charges 70 New York City housing workers in largest-ever single-day bribery takedown

The New York City Housing Authority (NYCHA) accepted significant reforms to its no-bid contracting process after 70 current and former employees were charged with bribery and extortion. The defendants purportedly used their positions of public trust and responsibility to demand and receive cash in exchange for NYCHA contracts. They either required contractors to pay upfront in order to be awarded the contracts or required payment after the contractor completed the work and needed an NYCHA employee to sign off on the job so the contractor could receive payment from the authority. In total, the defendants allegedly demanded more than $2 million in corrupt payments from contractors in exchange for awarding over $13 million worth of no-bid contracts.

SOURCE: U.S. Department of Justice

Sanctions

U.S. Commerce Secretary says inferior Huawei chip demonstrates effectiveness of sanctions

Although the chip powering the Huawei Mate 60 Pro phone is the most advanced semiconductor China has produced so far, U.S. Commerce Secretary Gina Raimondo insists it is still years behind American chips. This demonstrates that U.S. curbs on shipments to the Chinese telecommunications equipment giant are working, she argues. The U.S. added Huawei to the Entity List in 2019 amid fears it could spy on Americans.

SOURCE: Reuters

Ten individuals charged for roles in scheme to evade U.S. sanctions

The DOJ charged 10 defendants with conspiring to unlawfully procure millions of dollars' worth of aircraft parts from the U.S. to service the aircraft fleet of Venezuelan state-owned oil company PetrÛleos de Venezuela (PDVSA), in violation of U.S. sanctions and export controls. The defendants purportedly concealed from U.S. companies that the Honeywell Turbofan Engines and other parts were destined for Venezuela by exporting them to Novax Group in Costa Rica and Aerofalcon in Spain. These two companies were added to the U.S. Department of Commerce's Entity List in November 2023. The defendants have been charged with conspiring to violate the International Economic Emergency Powers Act and, if convicted, face a maximum penalty of 20 years in prison.

SOURCE: U.S. Department of Justice

U.S. further restricts Iran's access to low-level technologies following air attack on Israel

In response to Iran's unprecedented air attack on Israel and its continued military support for Russia, the Bureau of Industry and Security imposed additional controls to further restrict the Middle Eastern country's access to basic commercial-grade microelectronics and other low-level technologies. As a result, Iran will not be able to access a broader range of items, including those manufactured abroad using U.S. technology.

SOURCE: Bureau of Industry and Security

U.S. reduces licensing requirements for Australia, U.K. to support defense trade, innovation

To advance the goals of the AUKUS Enhanced Trilateral Security Partnership, the Bureau of Industry and Security (BIS) is removing Commerce Control List license requirements to allow Commerce-controlled military items, missile technology-related items, and hot section engine-related items to be exported or re-exported to Australia and the U.K. without a license, according to an interim final rule published in the Federal Register. These changes are expected to reduce licensing burdens for trade with Australia and the U.K. by a total of over 1,800 licenses valued at more than $7.5 billion per year.

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Sanctions (cont'd)

Existing license requirements will remain in place for certain satellites and related items, certain items controlled under the Chemical Weapons Convention, and items controlled for short supply reasons, as well as certain law enforcement restraints and riot control equipment, implements of torture or execution, and horses exported by sea.

SOURCE: Bureau of Industry and Security

Biden administration to reinstate Venezuela oil sanctions after President Nicolás Maduro reneges on democracy deal

The Treasury Department will not seek renewal of temporary sanctions relief for the South American country's oil and gas sector after determining that President Nicolás Maduro's government failed to fulfill a 2023 agreement to implement democratic reforms. Although there was some progress under the deal, the U.S. was "concerned that Maduro and his representatives prevented the democratic opposition from registering the candidate of their choice, harassed and intimidated political opponents, and unjustly detained numerous political actors and members of civil society," said State Department spokesperson Matthew Miller. To allow business transactions in Venezuela's oil and gas sector to conclude in an orderly manner, the Treasury plans to create a 45-day wind-down of the sanctions relief.

SOURCE: Politico

U.S. clarifies rules restricting China's access to certain advanced technologies

To address threats to U.S. national security, the Bureau of Industry and Security (BIS) published an interim final rule (IFR) to revise, correct, and clarify a previously released 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. The rules reinforce controls to restrict the People's Republic of China's (PRC) ability to purchase advanced computing chips and manufacture advanced chips critical for military advantage. Among other things, the IFR clarifies that:

- Pre-export notification to the BIS is required for computers and other products that incorporate integrated circuits that require pre-export notification; and
- Parts and components exported for ultimate incorporation into indigenous PRC Semiconductor Manufacturing Equipment require a BIS license for the initial export.

The BIS explained that these sector-based export controls are calibrated to address the PRC government's efforts to produce and use advanced integrated circuits, which can be used for the next generation of advanced weapon systems and advanced AI applications.

SOURCE: Bureau of Industry and Security

Related: China raises concerns with U.S. over chip-making export controls, sanctions**-Reuters**

Sanctions (cont'd)

Swiss private bank to pay $3.74M to settle potential civil liability for apparent U.S. sanctions violations

Under a settlement reached with the Office of Foreign Assets Control, EFG International will pay $3.74 million for processing 873 securities transactions totaling approximately $30.4 million in apparent violation of the Cuban Asset Control Regulations, the Kingpin Act, and Executive Order 14024. The settlement amount reflects that the Swiss privacy bank voluntarily self-disclosed the apparent violations, which the OFAC determined were non-egregious, and took significant remedial measures.

Nevertheless, the OFAC warned that the case shows that financial institutions with global clientele, including foreign securities firms who hold omnibus accounts at U.S. firms, may face certain sanctions risks. Consequently, foreign financial institutions that maintain omnibus accounts at U.S. custodians or otherwise engage in securities transactions with U.S. persons are advised to make sure they have risk-based controls in place to prevent U.S. firms from inadvertently providing services to sanctioned parties or jurisdictions.

SOURCE: Office of Foreign Assets Control

Intellexa Consortium becomes first spyware organization sanctioned by U.S.

The Office of Foreign Assets Control sanctioned two individuals and five entities associated with the Intellexa Consortium for their role in developing, operating, and distributing its Predator spyware, which has been used to target U.S. government officials, journalists, policy experts, and other Americans. Not only is this the first time the Treasury Department has sanctioned a spyware organization, but it is also a groundbreaking next step in the Biden administration's efforts to discourage the proliferation and misuse of commercial surveillance tools. The department will continue to track any new businesses created by the sanctioned entities in case they try "to play corporate shell games," a senior administration official said.

SOURCES: U.S. Department of Treasury, Axios

Additional Highlights

- The Bureau of Industry and Security issued a final rule to amend sanctions on Russia and Belarus under the Export Administration Regulations (EAR) to add a license exception for EAR99 medical devices and related parts, components, accessories, and attachments.
- The BIS added 11 entities under the destinations of the People's Republic of China (PRC), Russia, and the United Arab Emirates to the Entity List for supporting the modernization of the PRC Military and providing support to Russia's military.
- To sustain U.S. financial pressure on Belarus for its continuing support for Russia's war against Ukraine, the Office of Foreign Assets Control designated six revenue-generating state-owned enterprises, one entity, and five individuals involved in facilitating transactions for a U.S.-designated major Belarusian defense sector

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Sanctions (cont'd)

enterprise, as well as five entities and five individuals involved in a global arms network doing business with a U.S.-designated Belarusian defense firm. The action also builds on U.S. sanctions imposed in response to Belarus's fraudulent election in 2020.

- The DOJ, BIS, and OFAC issued a joint compliance note highlighting the applicability of U.S. sanctions and export control laws to foreign-based entities and individuals and the risks they face for non-compliance.

SOURCES: Federal Register, Bureau of Industry and Security, U.S. Department of the Treasury, U.S. Department of Justice

Other Major Developments

Puerto Rico man convicted in first-ever crypto open-market manipulation case

A New York federal jury convicted Avraham Eisenberg of commodities fraud, commodities market manipulation, and wire fraud in connection with a scheme to fraudulently obtain roughly $110 million worth of crypto from decentralized crypto exchange Mango Markets and its customers by artificially manipulating the price of certain perpetual futures contracts. This groundbreaking prosecution should cause would-be financial criminals to "think twice before daring to engage in illicit conduct," said U.S. Attorney Damian Williams for the Southern District of New York.

SOURCE: U.S. Department of Justice