

Speaker 1 ([00:20](#)):

[inaudible]

Cuneyt Akay ([00:20](#)):

Welcome to the GT ABC podcast. I'm your host, Cuneyt Akay here. The GT stands for Greenberg Traurig and the ABC stands for anti-bribery and corruption. On this episode, we're going to talk about something, a little different. We're going to be talking about counting and numbers, and don't worry. There won't be any math involved. And if there is the math, won't be complicated. And I promise there won't be a test at the end. And finally, I'm taping this episode in the midst of the U S elections. And I promise that when I talk about counting and numbers, there'll be no references to elections, but I did figure this will be a good time to discuss counting. And more specifically how FCPA commentators count and track FCPA cases. Now you would think that it wouldn't be that difficult, but for some reason, year over year, it turns out to be a challenge.

Cuneyt Akay ([01:11](#)):

And I'll give you an example by just looking at the enforcement numbers from 2019 alone. When I say enforcement numbers, I'm specifically talking about FCPA, corporate enforcement, FCPA settlement amounts, and individuals charged with FCPA related crimes. Now, depending on which commentators you read, you would either think that there were 14 FCPA cases in 2019 that were settled, or as many as 20, depending on which commentators you read about 2019, you would think the settlement amounts were either about 2.6, \$5 billion or something close to \$3 billion in total corporate settlements last year. And as we'll talk about in a few minutes, if you were to look at the numbers for 2020 as they stand right now, the numbers right now from FCPA commentators are continuously all over the map when it comes to settlement amounts, and don't even get me started on individual cases. Since last year, if you looked at FCPA commentators, you would see some that would suggest that individual enforcement was somewhere around the mid twenties in terms of number of cases.

Cuneyt Akay ([02:13](#)):

And I read one or two FCPA commentators that had individual enforcement cases at nearly 50. So why are the numbers so disparate? Why is there this much confusion? Well, we're going to dig into it on this episode. We're going to unpack the confusion and discuss a common sense approach for counting and tracking both corporate cases and individual cases. And also talk about the best way to track FCPA settlement mounts. So let's start with what should be the easiest, the number of corporate enforcement cases in a year, and as my good friend and FCPA commentator, the FCPA professor has made a plea for years is that he would like the FCPA commentators to adopt common language for tracking FCPA corporate enforcement. And I agree in his approach is the same approach that I use, which is the core approach. Well, what is the core approach? The core approach involves counting unique instances of FCPA scrutiny and not double counting parallel DOJ and sec actions when they involve the same core conduct and the same company or that company subsidiaries. So let's dig into that for a second. Last year, there were seven DOJ actions and 13 SEC actions all involving the FCPA. So some commentators would have, and I've seen this would list that as 20 FCPA corporate enforcement actions in 2019, Well, six of those cases involved both a DOJ

Cuneyt Akay ([03:48](#)):

And SEC prosecution against the same company or same, uh, subsidiaries. So it really doesn't make any sense to double count those when it was the same company and the same alleged conduct. So that's

why most FCPA commentators would have the number at 14 FCPA cases last year, because double counting just doesn't make any sense. And even when we had one case last year where the DOJ announced the settlement in June and the SEC subsequently announced the summit three months later, that would still be one FCPA case because the conduct was the same alleged misconduct against the same company in its subs. So there shouldn't be any confusion you're going this matter. But as I started by saying time and time again, we see numbers all over the place, but by following the core approach Where we don't Double count parallel DOJ and SEC investigations where they're alleging misconduct for the same core conduct. And again, it's really the same company. Even if there's some different subsidiaries involved, we count those as unique instances and not double cases or double counting of cases. Second, let's talk about settlement amounts. And again,

Cuneyt Akay ([05:05](#)):

This should also be something that is relatively easy for FCPA commentators to track, but much like the number of corporate enforcement cases. We see there's a lot of imprecision when it comes to announcing and talking about settlement amounts and many FCPA commentators end up confusing FCPA settlement amounts with global anti-corruption settlement amounts and why does this happen? Well it's because often times, particularly over the last several years, there are multiple jurisdictions that are prosecuting the same conduct, but it's important for us to remember only

Cuneyt Akay ([05:42](#)):

U.S. Department of justice and only the U S securities exchange commission can make or bring FCPA cases. And therefore companies can only settle FCPA charges with the DOJ and the SEC, the government cannot enforce the FCPA, even if the Brazilian government is involved in a multi-jurisdictional cross border investigation. So my plea is let's be precise when we're talking about some mounts, let's start with a good example. Again, I will go back to last year using the core method approach. As I mentioned, there are 14 FCPA settlements. And if we look at just the FCPA settlement amounts last year, those amounts were \$2.65 billion. Yet we seen time and time again, FCPA commentators say that settlement amounts last year were close to 3 billion dollars. And it's true when you're talking about global anti-corruption settlement amounts. But again, this is the issue with being imprecise.

Cuneyt Akay ([06:47](#)):

If we're talking not the FCPA, there are only 2.65, and I use only maybe somewhat sparingly or jokingly. I shouldn't say only the settlement amounts, the FCPA settlement amounts were \$2.65 billion. And yes, there was another 300 million that was collected by foreign government related to those FCPA cases. But those aren't counted as FCPA settlements because those companies settled with those foreign governments, certainly not for the FCPA. And if I was a betting man, I would almost guarantee we're going to see similar confusion in the 2020 numbers. Because earlier this year, we probably had the best example of imprecise FCPA settlement amount commentary. Earlier this year, the headlines read that one company settled for nearly \$4 billion. Well, it is true. There was a global anti-corruption settlement with the company that was nearly \$4 billion and the headlines everywhere kept on reading biggest FCPA case ever biggest FCPA settlement ever biggest FCPA fine ever, but that wasn't necessarily the case over 80% of the money was settled with foreign governments and making things even more complicated.

Cuneyt Akay ([08:04](#)):

Another 230 or so million was settled with the U.S. Government for ITAR violations, not for FCPA violations. So the FCPA component of that case was right around \$300 million, which doesn't put it

anywhere near the biggest FCPA settlement ever. So my plea is when we're thinking, about or discussing FCPA settlement amounts, we should always be precise. It is certainly fair to comment on global anti-corruption settlement amounts. And to point out when there are big settlements, certainly like we saw earlier this year when there was a nearly \$4 billion settlement, but if we're going to talk about FCPA settlements, it's important to be precise and to make sure that we're all using the same metrics and clearly understand that only those settlement amounts that are paid to the U S government. And that are the cases that are prosecuted by the DOJ and sec count as FCPA settlements.

Cuneyt Akay ([09:05](#)):

So now that we've talked about tracking corporate cases, and now that we've talked about settlement amounts and being more precise with settlement amounts, let's get to, what's really the tricky part, which is tracking individual enforcement cases. And this is where I believe that we really need to see some more consistency and standardization to ensure that we're tracking accurately and consistently individual enforcement over time. And here, I do understand why some commentators last year would say that there was roughly 20, some odd individual enforcement cases while others had the numbers closer to 50. So let me share with you the methodology that I use, which I believe will help be a consistent measure year over year in terms of how we can track individual enforcement cases.

Cuneyt Akay ([09:58](#)):

So let's start with, uh, the core approach very similar to tracking FCPA corporate enforcement. I use the core approach when looking at individual enforcement cases and with the core approach here, that means counting the individual, the person, not the number of actions. So it's just like, how we track the corporate case numbers. And so I'll give you an example. From last year in 2019, there were three individuals who were charged with FCPA violations by both the DOJ and the sec for actions involving the same alleged bribery conduct. So in that case, and those three individuals who were charged by both the DOJ and sec, the most accurate way to count those enforcement actions is to count those as three enforcement actions, not six it's, three individual people, and they were charged by both the DOJ and SEC. So often I see commentators that would count that as being six, a enforcement actions, which doesn't make a lot of sense to me. So using the core approach with individual enforcement cases is one of the methods that I use to help bring consistency with tracking. The second one is what I call the announced date approach. And it certainly is a challenge tracking individual enforcement actions in deciding what year to use for each case. First of all, as we know, cases can take a really long time to resolve and FCPA charges are often announced in one year, let's say in 2016 or 2017, but the case is subsequently resolved in a future year in 2020. So what I use in that scenario is I use the date that the DOJ or SEC announced the charges, not the date when the case is subsequently resolved.

Cuneyt Akay ([11:51](#)):

Second for prosecutorial, the government May file charges against an individual, but not publicly announced or until those charges until much later date. So for example, earlier this year, the DOJ publicly announced the unsealing of an indictment against three individuals stemming from, uh, indictments all the way back in 2015. So I don't necessarily go back and count those as 2015 cases. I would count those as 2020 cases using the announcement data approach. So ends up happening is without a standardized approach to tracking individual enforcement cases. It is easy to double count cases across years. So, as I just mentioned earlier, if someone, uh, who's indicted in 2015, but the announcement of that indictment when it's unsealed is in 2020, then the data would be skewed if you counted that as an 2015 enforcement action. And if you counted that as a 2020 enforcement action, so

to ensure individual enforcement actions not double counted, I utilize the date when the government publicly announced the charges and this approach ensures the individual enforcement actions are only counted once.

Cuneyt Akay ([13:05](#)):

And it's pretty easy to apply consistent consistently. Oftentimes I'll use, this is the date that the DOJ, uh, press release went out or the unsealing date instead of the indictment date, when those dates may differ. Of course, that doesn't mean that this isn't without challenge because oftentimes as we see news media or FCPA commentators will report on a case before the DOJ actually announces the charges. So earlier this year, um, we had an example where it had been reported in 2019. Uh, two individuals were witnesses in a trial and they pleaded guilty to FCPA violations themselves. But despite both of those individuals agreeing to guilty pleas the years before there were witnesses in the trial, their pleadings were not filed. And that made public by the DOJ until early 2020. So it still is a little bit of a challenge to figure out which years to count individual enforcement actions by using the announced date approach.

Cuneyt Akay ([14:09](#)):

But it's the closest thing I have found to bring some type of standardization. So in summary, what I often do and not what I often do, what I do when I'm trying to figure out which year to classify an individual enforcement action is one I look at when the FCPA charges are announced, not when they're resolved. And two, if there is a case that hasn't been publicly announced, I use the publicly announced or unsealed date to count for those individuals. Even if those charges were first brought years earlier. Now, the third thing here in individual enforcement actions is it's important to differentiate between FCPA charges and FCPA related charges. And this is another area of confusion here, and I certainly understand why some commentators only differentiate or only discussed FCPA charges and why some commentators will use FCPA related charges against individuals when tracking FCPA individual enforcement.

Cuneyt Akay ([15:13](#)):

One common issue is that FCPA commentators and even the DOJ, own FCPA Website, doesn't ,what they don't do is they don't clearly differentiate between FCPA charges against individuals. Meaning when an individual is actually charged with violating the FCPA or conspiring to violate the FCPA and non FCPA charges arising from FCPA investigations. And again, this can lead to lots of confusion and inaccuracy and tracking, particularly in recent years, the DOJ has charged numerous individuals with non FCPA Charges resulting from both corporate and individual FCPA investigations. And I have found that It's easiest to categorize these cases as FCPA related actions and FCPA related action typically arises out of an FCPA investigation where the DOJ is jurisdictional reach under the FCPA may not be long enough to capture the bribe recipient or the bribe facilitator. And in these circumstances, the DOJ will often charge the individuals with other financial crimes such as money laundering or wire fraud. And this approach is how the DOJ can punish particularly foreign, official bribed recipients who otherwise would not be able to be charged with FCPA violations. And why do I use the FCPA related Number? Well it's because

Cuneyt Akay ([16:39](#)):

Typically these are related to bribery offenses. Whereas I just mentioned earlier, the DOJ can't necessarily charge that particular individual with FCPA violations, but the underlying conduct, the underlying action involves allegations of bribery and corruption. And so typically we'll see is numerous

individuals will get charged at the same time, but two or three of the individuals, the DOJ or the U.S. Government may not have jurisdiction over for charging FCPA violations. But as we know, it's much easier for the U.S. Government to charge money laundering or wire fraud or other types of financial crimes. And so oftentimes we'll see, is coming out of the same conduct. Those individuals that can not be charged with FCPA violations will then get charged by the us government for these other financial crimes. Now, my plea here is that for the most accurate tracking is important to either one differentiate between individuals charged with FCPA violations and those charged with FCPA related violations is what I typically do when I talk about individual enforcement cases or to clearly state that the published statistics include both FCPA and FCPA related individual enforcement actions, if you're going to lump the numbers together.

Cuneyt Akay ([18:02](#)):

So that is my plea in terms of how we can count and track FCPA individual enforcement cases and make sure that we have a common language, not only for tracking corporate enforcement actions, but also for tracking individual enforcement actions. So my key takeaways from this episode of the GT ABC podcast, number one, as I promised, hopefully there was very little math and not a lot of counting. And I did not bring up the U S election. Number two, when we're talking about corporate enforcement and tracking of corporate enforcement cases, it is important to not double count DOJ and sec enforcement actions arising out of the same conduct in dealing with basically the same company. The third is when commentators are publishing statistics on FCPA settlement amounts, it's always important to be precise and to make sure that we're really talking about the actual FCPA settlement amounts or being clear that we're talking about the totality of the global anti-corruption settlement amounts when there is an FCPA in global anti-corruption settlement case.

Cuneyt Akay ([19:16](#)):

And finally, when it comes to individual enforcement, I know it's extremely tricky to track FCPA individual enforcement cases, but the three things I use are the core approach by counting the individual, not the number of actions. Number two, using the government's announced date to put the individual enforcement case in the right year to categorize it in the right year. And third to differentiate between FCPA charges and FCPA related charges will happy counting away. And I hope as we get into the year end FCPA statistics, that we have some more consistency and standardization across the board and the numbers are not as they typically are all over the place, but we'll see, and we'll keep holding out hope that at some point there will be a standardized approach for FCPA commentators when it comes to counting and tracking FCPA cases and settlement amounts. Thanks for tuning in to this episode of the GT ABC podcast.

Speaker 1 ([20:36](#)):

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