Paul|Weiss

FCPA Enforcement and Anti-Corruption Developments

2020 YEAR IN REVIEW

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Table of Contents

Executive Summary 1
Corporate Enforcement Overview 2
DOJ Corporate Enforcement 5
DOJ Policy Pronouncement Affecting Corporate Enforcement 6
Second Edition of the FCPA Resource Guide 6
Updated Guidance for Evaluating Corporate Compliance Programs 9
Application of Guidance for "Inability-to-Pay" Claims 10
DOJ's New Privilege Team 11
DOJ FCPA Opinion 11
China Initiative 12
SEC Corporate Enforcement 12
SEC Whistleblower Program 12
CFTC Developments 15
Compliance Monitors 16
Review of Select Corporate Resolutions 18
Airbus 18
Eni S.p.A. 19
Goldman Sachs 20
Vitol 21
Enforcement Actions Against Individuals 22
Legal Developments Affecting Enforcement Tools 25
Liu v. *SEC* 25
United States v. *Hoskins* 26
SEC v. *Fowler* 28
Foreign Jurisdictions Investigating and Prosecuting Corruption 29
Africa 29
Asia 29
Europe and the Middle East 31
Latin America 32
North America 34
Multilateral Development Bank Sanctions 34
The Administration Transition, COVID-19 and Looking Forward into 2021 35

Executive Summary

Despite the significant obstacles presented by the global pandemic, U.S. enforcement agencies remained "open for business" in 2020,[1] with the DOJ and the SEC assessing a record-breaking combined total of nearly $2.8 billion in corporate penalties in FCPA settlements, and foreign authorities assessing an additional $2.9 billion in penalties in related cases. The number of corporate FCPA enforcement actions resolved by the DOJ and the SEC remained comparable to prior years, and clearly signaled the U.S. authorities' enduring commitment to vigorous enforcement of the FCPA and to multilateral cooperation.

Although both the DOJ and the SEC continued to emphasize individual accountability, in a departure from recent years, both authorities announced considerably fewer individual prosecutions, returning to levels seen in 2015. The decline may reflect the impact of the pandemic on the authorities' ability to bring new criminal charges or initiate civil actions, which require a grand jury and open courthouses.

The DOJ and the SEC also published an updated edition of the 2012 FCPA Resource Guide and announced several policy changes intended to advance the authorities' stated desire to increase transparency and consistency in the way that the FCPA is enforced. The policy revisions seek to lessen the burden and costs of corporate investigations, and to avoid outcomes that disproportionately penalize innocent employees, stakeholders and customers. The policy updates, in our view, reflect the enforcement authorities' maturing and nuanced understanding of companies' efforts to comply with the FCPA, particularly in light of the exceptional obstacles posed by the global pandemic.

Over the past decade, FCPA enforcement has proven remarkably steady year after year, regardless of the administration in power. Even the Trump Administration's DOJ and SEC have imposed record penalties under the FCPA, despite early concerns about Mr. Trump's reported views about the statute. It would be surprising if enforcement did not accelerate under the Biden Administration.

Our reflections on the year's most significant developments in anti-corruption and FCPA enforcement and policy are below.

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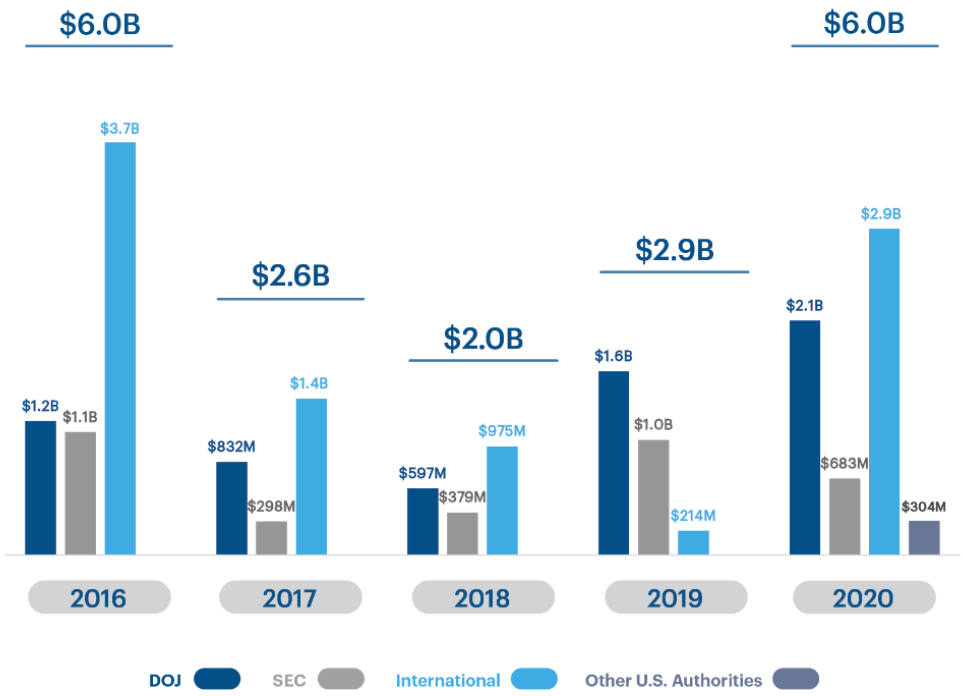
[1] Brian C. Rabbitt, Acting Asst. Att'y Gen., U.S. Dep't of Justice, *Remarks at the ACI 37th Annual Conference on the FCPA* (Dec. 3, 2020), https://www.justice.gov/opa/speech/remarks-acting-assistant-attorney-general-brian-c-rabbitt-aci-37th-annual-conference-fcpa.

Corporate Enforcement Overview

In 2020, the DOJ and the SEC resolved a combined 16 enforcement actions against business entities,[2] resulting in over $6 billion in fines, penalties, disgorgement and pre-judgment interest, of which $2.1 billion was assessed by the DOJ and over $683 million by the SEC.[3] The DOJ credited another $304 million in penalties assessed by the Board of Governors of the Federal Reserve System and the New York State Department of Financial Services in related investigations, and $2.9 billion in penalties assessed by foreign authorities in foreign prosecutions associated with U.S. enforcement actions, the largest amount since the $3.7 billion in penalties assessed by foreign authorities in 2016.



FCPA CORPORATE ENFORCEMENT ACTION PENALTIES 2016–2020

2 The data reflected in this report counts only cases that charge one or more FCPA violations and does not include cases that may have arisen from an anti-corruption investigation but solely charge non-FCPA violations, such as money laundering, wire fraud or domestic bribery.

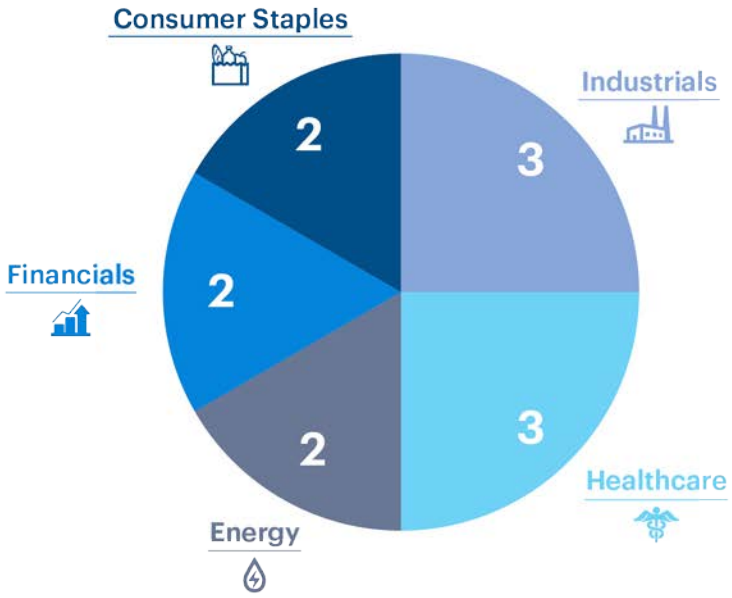
3 To determine the total penalty amounts, we counted criminal and civil penalties, fines, disgorgement and pre-judgment interest payments attributable only to the FCPA charges in a resolution with the DOJ or the SEC. Thus, where a resolution included an FCPA penalty in addition to a non-FCPA penalty, only the FCPA penalty was aggregated. Additionally, the total penalty amounts account for offsets, where applicable, between the penalties assessed by the DOJ and the SEC as well as offsets between U.S. and foreign authorities.

The DOJ and the SEC each resolved eight corporate enforcement actions in 2020.[4] The DOJ's total is consistent with recent years, while the SEC's total corporate enforcement resolutions have decreased notably from the past two years.

FCPA CORPORATE ENFORCEMENT ACTION RESOLUTIONS 2016–2020

[4] Enforcement actions were counted based on the year they were announced. *See Related Enforcement Actions*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal-fraud/related-enforcement-actions; *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml. Resolutions announced on the same day by the same enforcement agency against corporate affiliates were counted as one resolution (e.g., Novartis Hellas S.A.C.I. and Alcon Pte Ltd, as well as The Goldman Sachs Group, Inc. and Goldman Sachs (Malaysia) Sdn. Bhd.). Charges brought by different agencies against the same corporation were counted as separate corporate enforcement actions (e.g., Herbalife Nutrition Ltd.'s deferred prosecution agreement with the DOJ and cease-and-desist order with the SEC).

The DOJ and the SEC entered into corporate resolutions with companies across a variety of industries.[5] As in recent years, enforcement activity remained active in the financial, healthcare and energy sectors. Although the industry breakdown continues to be diverse, with U.S. authorities most active in 2020 in the industrials and healthcare sectors, the largest settlement involved the financial sector.[6]



2020 FCPA CORPORATE ENFORCEMENT RESOLUTIONS BY INDUSTRY

5 For the purposes of industry classification, corporations charged by different agencies were counted as one corporation (e.g., Herbalife Nutrition Ltd.—despite entering a deferred prosecution agreement with the DOJ and consenting to a cease-and-desist order with the SEC—was, for industry classification purposes, counted only once). In 2020, the DOJ and the SEC resolved a total of sixteen separate enforcement actions against twelve corporations and their subsidiaries or affiliates.

6 Industries were defined according to the sector classifications set by S&P Global Market Intelligence, pursuant to the Global Industry Classification Standard. *See Companies, Assets and Profiles*, S&P GLOBAL (2020), https://platform.mi.spglobal.com/web/client?auth=inherit#dashboard; S&P GLOBAL, GLOBAL INDUSTRY CLASSIFICATION STANDARD (2018), https://www.spglobal.com/marketintelligence/en/documents/112727-gics-mapbook_2018_v3_letter_digitalspreads.pdf. Resolutions announced on the same day against corporate affiliates were counted as one resolution, irrespective of the enforcement agency.

The map below demonstrates the wide range of countries that have been the locus of conduct deemed to violate the FCPA, based upon the allegations in the 2020 corporate resolutions. As in 2019, China and Brazil featured in the largest number of FCPA cases, at four cases each.

2020 FCPA CORPORATE ENFORCEMENT ACTIONS BY LOCATION

DOJ Corporate Enforcement

In 2020, the DOJ announced eight corporate resolutions and assessed $2.1 billion in penalties. Four of the resolutions in 2020 involved foreign companies, which, while still substantial, is a decrease from 2019, when five of the seven resolutions involved foreign companies.

The DOJ issued one public declination letter in 2020 pursuant to the FCPA Corporate Enforcement Policy.[7] The declination letter, issued to World Acceptance Corporation, specified that despite the bribery

[7] *See* Letter from Robert Zink, Acting Chief, U.S. Dep't of Justice Crim. Div. Fraud Sec. (Aug. 5, 2020), https://www.justice.gov/criminal-fraud/file/1301826/download; *see also* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ Issues New FCPA Corporate Enforcement Policy (Nov. 30, 2017), https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/doj-issues-new-fcpa-corporate-enforcement-policy?id=25619.

committed by employees of World Acceptance Corporation and its subsidiaries in Mexico, the DOJ declined prosecution because the company had agreed to disgorge all ill-gotten gains to the SEC, amounting to $17.8 million, and to divest itself of its Mexico subsidiaries.[8]

Based on the companies' public announcements, the DOJ also apparently closed its investigations, without issuing public declination letters, into at least five companies that had been under investigation for potential corruption offenses (CHS Inc.; USANA Health Sciences, Inc.; Alexion Pharmaceuticals, Inc.; Glaxosmithkline PLC; and AstraZeneca PLC).[9] The bases for these decisions are not known, including whether there was conduct sufficient to support a prosecution.

DOJ Policy Pronouncement Affecting Corporate Enforcement

In 2020, the DOJ made several policy pronouncements affecting FCPA corporate enforcement, including updates to the 2012 FCPA Resource Guide, guidance on how prosecutors should evaluate the effectiveness of corporate compliance programs and guidance on how prosecutors should evaluate claims that corporations are unable to pay a proposed fine or monetary penalty. The DOJ also formed a new team focused on privilege and collection issues and issued an FCPA advisory opinion for the first time since November 2014. As 2020 presented unique challenges to anti-corruption investigations, the DOJ has used the period of the global pandemic to clarify its expectations of how companies should allocate resources to their compliance programs or respond to investigative inquiries. Although it is too early to evaluate their effect on FCPA enforcement, the DOJ has stated that it intends for these updated policies to increase transparency and to lessen the severity and costs of corporate investigations.

Second Edition of the FCPA Resource Guide

In July 2020, the DOJ Criminal Division and the SEC jointly released the second edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the "2020 Resource Guide").[10] The first edition of the Resource Guide was released in November 2012, marking the first time the U.S. authorities had published a compilation of detailed information about their interpretation and enforcement of the FCPA. In a foreword announcing the updated guidance, former Assistant Attorney General Brian Benczkowski, former SEC Enforcement Division Co-Director Steven Peikin and former SEC Enforcement Division Director Stephanie Avakian noted that "[a]lthough many aspects of the [original] *Guide* continue to hold true today,

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8 *See* Letter from Robert Zink, *supra* note 6.; *see also In the Matter of World Acceptance Corp.*, Exchange Act Release No. 89489, at 6 (Aug. 6, 2020), https://www.sec.gov/litigation/admin/2020/34-89489.pdf; Press Release, Sec. & Exch. Comm'n, *SEC Charges Consumer Loan Company with FCPA Violations* (Aug. 6, 2020), https://www.sec.gov/news/press-release/2020-177.

9 Closures of investigations were counted based on the year in which the U.S. authority appears to have closed the investigation, irrespective of the year in which the company made its disclosure.

10 *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Developments: Q3 2020 (Oct. 16, 2020), https://www.paulweiss.com/media/3980548/fcpa_review_q3_2020.pdf.

the last eight years have also brought new cases, new law, and new policies. The Second Edition of the *Guide* reflects these updates."[11] While the 2020 Resource Guide breaks little new ground, it incorporates legal and policy developments that have occurred since 2012, including updates to the Evaluation of Corporate Compliance Programs, discussed further below. Other notable updates include the following:

DOJ FCPA Corporate Enforcement Policy: The 2020 Resource Guide adds a new section discussing the DOJ FCPA Corporate Enforcement Policy, first announced in November 2017, that applies to criminal prosecutions and corporate resolutions in the FCPA context. The policy provides that "where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances."[12] The policy—which was revised over the years to clarify the information companies must disclose, and when, to obtain leniency—was incorporated into the Justice Manual and was intended to incentivize companies to disclose FCPA violations and provide robust cooperation in subsequent investigations. The 2020 Resource Guide notes that "[a]ggravating circumstances that may warrant a criminal resolution instead of a declination include, but are not limited to: involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism."[13] Of note, however, the 2020 Resource Guide acknowledges that "[e]ven where aggravating circumstances exist, DOJ may still decline prosecution, as it did in several cases in which senior management engaged in the bribery scheme," citing at least three declination letters issued in the past two years.[14] Finally, the 2020 Resource Guide clarifies that the Corporate Enforcement Policy "applies only to DOJ, and does not bind or apply to SEC."[15]

Conspiracy and Accomplice Liability for FCPA Anti-Bribery Violations: The 2020 Resource Guide now accounts for the Second Circuit's 2018 decision in *United States* v. *Hoskins*,[16] which limited the FCPA's extraterritorial jurisdiction over non-U.S. nationals based on conspiracy or accomplice liability theories. The Guide acknowledges that, at least in the Second Circuit, foreign actors may be criminally prosecuted for conspiring to violate the FCPA's anti-bribery provisions or aiding and abetting such a violation *only* if they have a specific nexus to the U.S., as expressly listed in the FCPA's anti-bribery provisions.[17] The 2020 Resource Guide deletes the DOJ's and SEC's position in the 2012 Resource Guide—now overruled by *Hoskins*—that foreign actors can be prosecuted "regardless of whether the foreign

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11 U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition (2020), https://www.justice.gov/criminal-fraud/file/1292051/download [hereinafter "2020 Resource Guide"].

12 *Id.* at 51.

13 *Id.*

14 *Id.* at 51–52 & n.301 (citing DOJ declination letters issued to Cognizant Technology Solutions Corporation, Insurance Corporation of Barbados Limited, and Guralp Systems Limited).

15 *Id.*

16 No. 3:12-CR-238 (JBA), 2020 WL 914302 (D. Conn. Feb. 26, 2020).

17 2020 Resource Guide, at 36.

national or company itself takes any action in the United States."[18] Of note, however, the 2020 Resource Guide recognizes that at least one district court in the Seventh Circuit has rejected the *Hoskins* decision, leaving some ambiguity with regard to whether or how the DOJ will prosecute conspiracy or accomplice liability theories outside the Second Circuit.[19] Legal developments in the *Hoskins* case are discussed in more detail below.

Mergers and Acquisitions and Successor Liability: Acquisition due diligence and successor liability remain significant issues in FCPA enforcement. In the 2020 Resource Guide, the DOJ and SEC note that, where "robust pre-acquisition due diligence may not be possible," the agencies "will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts."[20] The 2020 Resource Guide cites recent enforcement actions and declinations in this area and emphasizes that "an acquiring company that voluntarily discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity."[21]

Forfeiture and Disgorgement: The 2020 Resource Guide includes a new, extended discussion on forfeiture and disgorgement, noting that, in addition to criminal or civil penalties, companies may be required to forfeit the proceeds of their crimes or disgorge the profits generated from the crimes, to "ensur[e] that the perpetrator does not profit from the misconduct."[22] While this section also discusses two recent Supreme Court decisions pertaining to disgorgement—*Kokesh* v. *SEC*,[23] where the Supreme Court ruled that the civil disgorgement remedy is subject to a five-year statute of limitations, and *Liu* v. *SEC*,[24] discussed below, where the Court ruled that disgorgement is permissible equitable relief under certain conditions—Congress has since passed the National Defense Authorization Act ("NDAA"), which contains a provision giving the SEC statutory authority to seek disgorgement as a remedy in federal court and establishing a 10-year statute of limitations for disgorgement and equitable remedies, thereby substantially lessening the impact of *Kokesh* and *Liu*.[25]

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18 *Compare* U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the* U.S. Foreign Corrupt Practices Act, at 12 (2012), https://www.justice.gov/iso/opa/resources/29520121114101438198031.pdf, *with* 2020 Resource Guide, at 11. The Guide also deletes language in a hypothetical from the 2012 Resource Guide stating that a foreign actor who has never taken any actions in U.S. territory "can still be subject to jurisdiction under a traditional application of conspiracy law and may be subject to substantive FCPA charges . . . for the reasonably foreseeable substantive FCPA crimes committed by a co-conspirator." *Id*.

19 2020 Resource Guide, at 36.

20 *Id*. at 29.

21 *Id*. at 29–32.

22 *Id*. at 71.

23 137 S. Ct. 1635 (2017).

24 140 S. Ct. 1936 (2020).

25 H.R. 6395, 116th Cong. § 6501 (2020).

Statute of Limitations in Criminal Cases: The 2020 Resource Guide now draws a distinction between the statutes of limitations for the FCPA's anti-bribery provisions and the accounting provisions.[26] The Guide notes that for substantive violations of the FCPA anti-bribery provisions, the general five-year limitations period set forth in 18 U.S.C. § 3282 applies. In contrast, for violations of the FCPA accounting provisions, which are defined as "securities fraud offense[s]" under 18 U.S.C. § 3301, there is a limitations period of six years. This update will be most consequential for issuers, as it has potential implications for the scope of investigations, the length of corporate document retention policies and the temporal reach of regulatory FCPA investigations.

Coordinated Resolutions: New to the 2020 Resource Guide is a discussion of the DOJ and SEC efforts to avoid "piling on" by crediting fines, penalties, forfeiture and disgorgement assessed by foreign authorities resolving investigations with the same company for the same conduct.[27]

Law Enforcement Partners: The 2020 Resource Guide notes the growing number of U.S. enforcement agencies investigating FCPA violations, which includes the FBI, the Board of Governors of the Federal Reserve System, the CFTC, and the Department of Treasury's Office of Foreign Assets Control and Finance Crimes Enforcement Network.[28]

Gifts, Travel, Entertainment and Other Payments to Third Parties: Finally, the 2020 Resource Guide provides recent examples of settlement actions involving gifts and hospitality, travel and entertainment and other payments to third parties. Examples include paying for foreign officials to travel to sporting events, paying for school tuition for the children of foreign officials and shipping luxury vehicles to foreign officials.[29]

Updated Guidance for Evaluating Corporate Compliance Programs

In June 2020, one month before the 2020 Resource Guide was released, the DOJ Criminal Division updated its guidance on how prosecutors evaluate the effectiveness of corporate compliance programs, titled Evaluation of Corporate Compliance Programs, which was originally released in 2017.[30] The compliance program guidance was updated in 2019 to focus on three key questions: (1) Is the corporation compliance program well designed?; (2) Is the program being applied earnestly and in good faith? (In other words, is the program being implemented effectively?); and (3) Does the corporation's compliance program work in

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26 *Id.* at 36–37.

27 *Id.* at 71.

28 *Id.* at 5.

29 *Id.* at 15.

30 *See* U.S. Dep't of Justice Crim. Div., Evaluation of Corporate Compliance Programs (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download; *see also* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ 2020 Guidance for Evaluating Corporate Compliance Incorporates Feedback From Business and Compliance Communities (June 8, 2020), https://www.paulweiss.com/media/3980277/08june20-fcpa.pdf.

practice? The 2020 guidance expands on updates released in 2019 by adding language to and rephrasing various sections. In one instance, the new version directs prosecutors to ask companies whether they are "adequately resourced and empowered to function effectively" instead of whether compliance programs have been "implemented effectively." It also includes a greater focus on third-party risk and how the compliance program identifies and handles it. According to former Assistant Attorney General Brian Benczkowski, the new guidance "reflects additions based on our own experience and important feedback from the business and compliance communities."[31] The 2020 Resource Guide incorporates these updates and clarifies that both the DOJ and SEC "employ a common-sense and pragmatic approach" and utilize the questions in the guide to evaluate compliance programs.[32]

Application of Guidance for "Inability-to-Pay" Claims

DOJ guidance on how prosecutors should evaluate claims by companies that say they cannot pay a criminal penalty has taken on new relevance in light of the economic downturn resulting from the COVID-19 pandemic. For the first time, in September 2020, prosecutors applied the DOJ Criminal Division's guidance on how federal prosecutors should evaluate corporations' "inability to pay" claims.[33] The DOJ applied the guidance in giving Sargeant Marine Inc. ("SMI"), a Florida-based asphalt company, a discount of more than 80% off its criminal penalty when the company pleaded guilty and agreed to pay $16.6 million to resolve FCPA charges.[34] Without providing specific details, the DOJ identified two factors that contributed to the determination that SMI could not pay the full penalty: (1) the company's current financial condition—including its income, earning capacity and resources—had been impacted by the sale of its interest in a joint venture; and (2) the company had limited alternative sources of capital, including potential loans against guaranteed future assets.

In October 2020, Acting Assistant Attorney General Brian Rabbitt remarked that companies have increasingly claimed they cannot pay criminal penalties as a result of the economic downturn associated with the COVID-19 pandemic.[35] It remains to be seen, however, whether prosecutors will apply the guidance in a greater number of cases—despite the pandemic, Rabbitt stated that the DOJ is not treating inability-to-pay claims any differently now than it ordinarily would.

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31 Dylan Tokar, *Justice Department Adds New Detail to Compliance Evaluation Guidance*, WALL ST. J. (June 1, 2020), https://www.wsj.com/articles/justice-department-adds-new-detail-to-compliance-evaluation-guidance-11591052949.

32 2020 Resource Guide, at 57.

33 *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ Announces Guidance for "Inability-to-Pay" Claims (Oct. 10, 2019), https://www.paulweiss.com/media/3979024/10oct19-inability-to-pay-claims.pdf.

34 *See* Plea Agreement at 6, *United States* v. *Sargeant Marine, Inc.*, Cr. No. 20-CR-363 (E.D.N.Y. Sept. 21, 2020).

35 *See Companies Raise Inability-to-Pay Claims Amid Pandemic, Justice Department Official Says*, WALL ST. J. (Oct. 8, 2020), https://www.wsj.com/articles/companies-raise-inability-to-pay-claims-amid-pandemic-justice-department-official-says-11602191012.

DOJ's New Privilege Team

This year, the DOJ's Criminal Division created a new Special Matters Unit within the Fraud Section to focus on privilege and evidence collection issues.

In 2018, likely in response to judicial opinions and high-profile scrutiny surrounding taint teams,[36] the Criminal Division's Fraud Section Strategy, Policy, and Training (SPT) Unit began hiring for a new privilege team dedicated to "conduct, supervise, and litigate legal privilege matters and filter reviews on behalf of the Fraud Section's three litigating units (Health Care Fraud (HCF), Securities and Financial Fraud (SFF), and Foreign Corrupt Practices Act (FCPA))."[37] It remains to be seen how prominently this specialized, dedicated new privilege team features in the DOJ's FCPA investigations.

DOJ FCPA Opinion

On August 14, 2020, the DOJ issued its first FCPA Opinion since November 2014, advising a U.S.-based company that a payment to the foreign subsidiary of a foreign state-owned bank would not trigger an enforcement action.[38] The DOJ issued its advisory opinion pursuant to the Department's "FCPA Opinion Procedure," 28 C.F.R. § 80.4, which enables an "issuer" or "domestic concern" to obtain an opinion as to whether certain specified, prospective—not hypothetical—conduct conforms with the DOJ's present enforcement policy regarding the FCPA's anti-bribery provisions. The Company initially submitted its opinion request on November 5, 2019, and provided supplemental information on January 15, 2020, February 10, 2020, June 18, 2020 and July 17, 2020.[39] The DOJ issued its opinion on August 14, 2020—more than nine months after the Company's request was submitted. Given the length of time required to address what appears to be a plain vanilla FCPA question, the DOJ does not appear to be encouraging greater use of the opinion procedure process, particularly where time is of the essence.

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[36] The DOJ previously used rotating privilege teams—"taint teams"—in which prosecuting attorneys and agents, who were not involved in the underlying investigation, reviewed the materials obtained during the investigation for privilege before providing them to the prosecuting attorneys. In 2018, the FCPA Unit suffered a damaging ruling by the U.S. Court of Appeals for the Fourth Circuit in a privilege dispute with Walmart. *See* Adam Dobrik, *Walmart Beats DOJ in FCPA Privilege Tussle*, GLOB. INVESTIGATIONS REV. (Aug. 3, 2018), https://globalinvestigationsreview.com/just-anti-corruption/walmart-beats-doj-in-fcpa-privilege-tussle.

[37] U.S. Dep't of Justice, Trial Attorney (Privilege Review), https://www.justice.gov/legal-careers/job/trial-attorney-privilege-review (last updated Nov. 15, 2018).

[38] *See FCPA Review, Opinion Procedure Release No. 20-01*, U.S. DEP'T OF JUSTICE, (Aug. 14, 2020), https://www.justice.gov/criminal-fraud/file/1304941/download; *see also* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Developments: Q3 2020 at 7-8 (Oct. 16, 2020), https://www.paulweiss.com/media/3980548/fcpa_review_q3_2020.pdf.

[39] Under 28 C.F.R. § 80.7, the DOJ must issue its FCPA Opinion "within 30 days of receipt of the opinion request, or, in the case of an incomplete response to a previous request for additional information, within 30 days of receipt of such response."

China Initiative

In November 2018, the DOJ announced the "China Initiative"—an effort to counter perceived national security threats to the United States from China, including by identifying FCPA cases involving Chinese companies that compete with American businesses. In connection with the China Initiative, the DOJ announced a number of China-related prosecutions in 2019, although only one appeared to involve FCPA charges. In 2020, the DOJ announced no FCPA actions against Chinese companies but did announce over 30 investigations related to the China Initiative, including charges of acting as an agent for China, wire fraud, passport and visa fraud, false statements and theft of trade secrets.[40] Given the FCPA's complex jurisdictional requirements and the current lack of cooperation between China and the United States generally, it is not surprising that the DOJ has had difficulty using the FCPA as a ready enforcement tool against Chinese companies operating outside the United States.

SEC Corporate Enforcement

In 2020, the SEC resolved eight corporate enforcement actions and assessed $683 million in penalties, including disgorgement and interest.

Based on the companies' public announcements, the SEC apparently closed its investigations into at least two companies that had been under investigation for potential FCPA offenses (USANA Health Sciences, Inc.; GlaxoSmithKline PLC). As with the DOJ's decisions to close various investigations, it is difficult to draw any conclusions from these decisions, including whether there was any identified conduct that violated the FCPA.

SEC Whistleblower Program

In fiscal year 2020, the SEC received the highest number of whistleblower tips since the start of the whistleblower program in 2011.[41] As reflected below, the SEC received over 6,900 tips overall—a 31% increase from the record-setting high in 2018 and a 130% increase since the start of the program. FCPA-related whistleblower tips increased for the first time since 2016, though the number of FCPA-related tips received in 2020 (208) was a small fraction of the overall tips, as was the case in 2019 (200). As noted by former SEC Enforcement Division Co-Director Steven Peikin, many of the tips were pandemic-related, although people may also feel emboldened to submit tips due to the increase in remote work, as employees

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40 *See Information About the Department of Justice's China Initiative and a Compilation of China-related Prosecutions since 2018*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/opa/information-about-department-justice-s-china-initiative-and-compilation-china-related (last updated Nov. 12, 2020).

41 *See* U.S. SEC. & EXCH. COMM'N, 2020 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM (Nov. 16, 2020), https://www.sec.gov/files/2020%20Annual%20Report_0.pdf. As stated in the SEC's report, statistics regarding whistleblower tips are current through the end of its fiscal year on September 30, 2020.

may feel less concerned about exposure and retaliation from a company or a colleague, combined with a decrease in compliance oversight on the ground.[42]

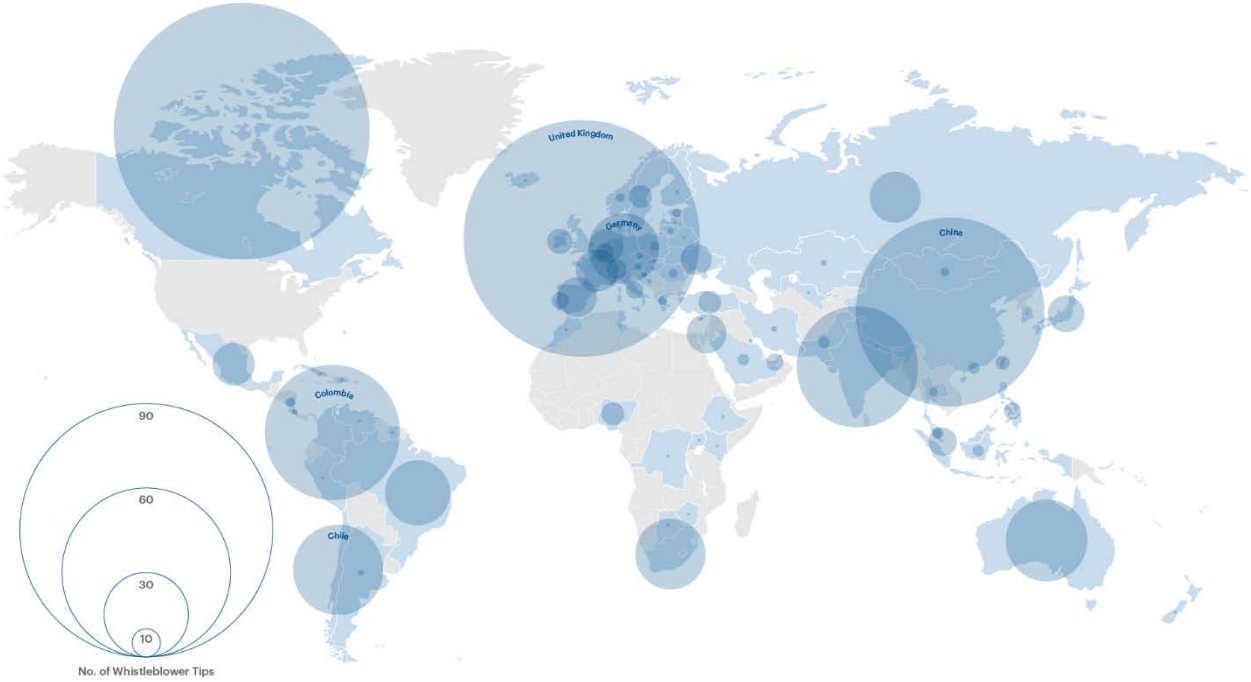
The SEC issued awards totaling $175 million to 39 whistleblowers—the highest award amount and highest number of individuals awarded than in any prior year. The next highest fiscal year was 2018 ($168 million) when 13 individuals were awarded. The awards in fiscal year 2020 included a nearly $50 million award to one individual, which was then the largest amount ever awarded to one individual until October 22, 2020, when the SEC granted a $114 million award to one whistleblower.[43] It cannot be determined whether an award went to a whistleblower in an FCPA case in fiscal year 2020.

SEC WHISTLEBLOWER TIPS AND TOTAL WHISTLEBLOWER AWARDS FISCAL YEARS 2016–2020

[42] *See* Steven Peikin, Co-Director, Sec. & Exch. Comm'n Div. of Enforcement, Keynote Address at Securities Enforcement Forum West 2020 (May 12, 2020), https://www.sec.gov/news/speech/keynote-securities-enforcement-forum-west-2020.

[43] *See* Order Determining Whistleblower Award Claim, Exchange Act Release No. 90247, File No. 2021-2 (Oct. 22, 2020), https://www.sec.gov/rules/other/2020/34-90247.pdf.

The SEC received tips from 78 countries. The largest number of tips came from the United States, Canada, the United Kingdom and the People's Republic of China. The large number of countries from which tips emanated continues to suggest, as it has in recent years, that contacting the SEC's whistleblower program has become a more well-known and accepted practice internationally. The map below shows the geographic distribution of whistleblower tips from foreign countries in 2020.[44]



2020 FCPA SEC WHISTLEBLOWER TIPS — WORLDWIDE

In addition, the SEC's Office of the Whistleblower adopted amendments to the SEC's whistleblower regulations on September 23, 2020.[45] According to former SEC Chairman Jay Clayton, these amendments are intended to "increase the speed and efficiency of preliminary determinations and awards."[46] Under the

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44 This map does not depict the approximately 4,087 tips from the United States and its territories.

45 *See* Whistleblower Program Rules, Exchange Act Release No. 34-88963 (Sept. 23, 2020), https://www.sec.gov/rules/final/2020/34-89963.pdf; *see also* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Developments: Q3 2020 at 6 (Oct. 16, 2020), https://www.paulweiss.com/media/3980548/fcpa_review_q3_2020.pdf..

46 *See* Jay Clayton, Chairman, Sec. & Exch. Comm'n, Strengthening Our Whistleblower Program (Sept. 23, 2020), https://www.sec.gov/news/public-statement/clayton-whistleblower-2020-09-23.

new rules, the SEC can streamline the award evaluation process by allowing whistleblowers with potential awards of less than $5 million to qualify for a presumption that they will receive the maximum statutory award amount. According to the SEC, this will help the agency process whistleblower claims faster and issue awards more efficiently since, historically, awards of less than $5 million have represented nearly 75% of all whistleblower awards.[47]

The amendments also affirm that the Commission is to determine award amounts exclusively based on the application of the award factors set forth in its whistleblower rules.[48] As a result, there will be no separate assessment of whether award amounts are too small or too large. Additionally, the amendments clarify that the Commission may waive the Tips, Complaints, and Referrals ("TCR") filing requirements if a whistleblower complies with the requirements within 30 days of first providing the information or of first obtaining actual or constructive notice of the TCR filing requirements.

CFTC Developments

In March 2019, the U.S. Commodity Futures Trading Commission ("CFTC"), announced for the first time its commitment to investigating cases involving foreign corrupt practices in violation of the Commodity Exchange Act ("CEA") and announced a leniency program for companies and individuals that cooperate and self-report foreign corrupt practices to the CFTC.[49] The announcements characterized the CFTC's involvement in foreign bribery investigations as part of a continued effort among U.S. agencies to coordinate the investigation of foreign corrupt practices to avoid "piling on," though at the same time it marked a new programmatic effort by the CFTC to address foreign bribery in the commodities markets. In October 2020, the CFTC released guidance for enforcement staff when considering whether to recommend recognition of a company's cooperation, self-reporting and remediation in the CFTC's enforcement orders.[50] The latest guidance does not make any substantive changes to prior CFTC policy. Rather, the new guidance clarifies how the Division will recommend that these assessments be reflected in the CFTC's

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47 *See* Press Release, Sec. & Exch. Comm'n, *SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program* (Sept. 23, 2020), https://www.sec.gov/news/press-release/2020-219.

48 *See* Whistleblower Program Rules, Exchange Act Release No. 34-88963 (Sept. 23, 2020), https://www.sec.gov/rules/final/2020/34-89963.pdf

49 *See* James M. McDonald, Director of Enforcement, Commodity Futures Trading Comm'n, Remarks at the American Bar Association's National Institute on White Collar Crime (Mar. 6, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/opamcdonald2; *see also* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, DOJ, FBI, and CFTC Announce FCPA Policy Revisions and Initiatives at 3-5 (Mar. 15, 2019), https://www.paulweiss.com/media/3978517/15mar19-doj-fcpa-revs.pdf.

50 *See* Memorandum, Commodity Futures Trading Comm'n, *Recognizing Cooperation, Self-Reporting, and Remediation in Commission Enforcement Orders* (Oct. 29, 2020), file:///C:/Users/07513/Downloads/ENFSelfReportingRemediationGuidance102920.pdf.

enforcement orders. According to Chairman Heath P. Tarbert, "the purpose of the CFTC's enforcement program is to foster a culture of compliance within the marketplaces [it] regulate[s]. This staff guidance furthers that goal by ensuring that the public understands the levels of recognition the CFTC may provide in its enforcement orders."[51] The CFTC guidance brings the agency into closer alignment with the DOJ's policy that spells out the outcomes available to corporations if they discover potential corrupt conduct and choose to proactively self-disclose and engage with prosecutors.

Compliance Monitors

In a stark departure from recent years, U.S. authorities imposed no compliance monitors or compliance consultants in FCPA cases in 2020, as reflected in the chart below.[52] In declining to impose monitors and consultants, U.S. authorities noted in multiple resolutions that the companies at issue (*e.g.*, Airbus and J&F Investimentos) were subject to oversight by foreign authorities, although not subject to a foreign authority's compliance monitor—a rationale which appears to be an offshoot of the DOJ's no "piling on" policy. The downturn in the use of compliance monitors may flow from the DOJ's 2018 guidance known as the "Benczkowski Memorandum," which highlights factors that prosecutors should consider when deciding whether to impose a monitor, and which emphasizes that a company's remediation efforts may obviate the need to impose an independent monitor.[53] The absence of monitorships may also flow from the DOJ's guidance updates in 2020 to the Evaluation of Corporate Compliance Programs, which clarifies that prosecutors will focus on assessing the adequacy and effectiveness of a compliance program at the time of a charging decision and resolution.[54] As now-former Deputy Assistant Attorney General Matthew Miner emphasized, remediation is critical to avoiding a monitor, and if a company does a root-cause analysis, identifies its compliance gaps and invests in remediation based upon its findings, the DOJ will likely not impose a monitor.[55]

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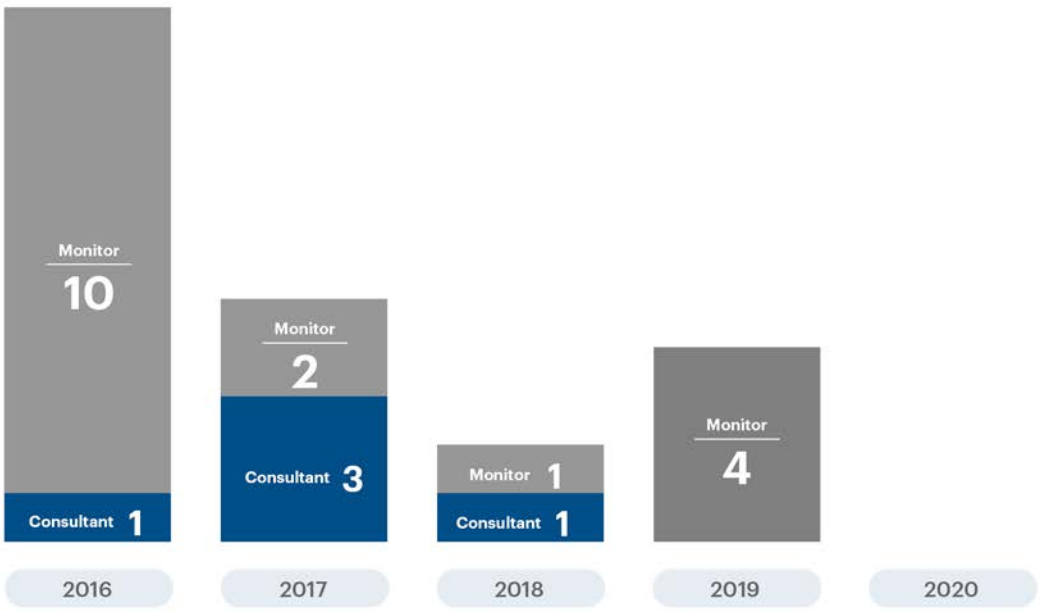
51 *See* Press Release, Commodity Future Trading Comm'n, *CFTC's Enforcement Division Issues Staff Guidance on Recognition of Self-Reporting, Cooperation, and Remediation* (Oct. 29, 2020), https://www.cftc.gov/PressRoom/PressReleases/8296-20.

52 Monitors and consultants imposed in corporate resolutions are counted based on a variety of considerations. Where the resolution involves both a parent and a subsidiary and/or both the DOJ and the SEC, whether more than one monitor/consultant is counted depends upon whether one individual appears to be serving in multiple capacities or multiple individuals appear to be serving in different capacities. This analysis is based upon the corporate resolution documents and, if necessary, third-party resources.

53 *See* Memorandum, U.S. Dep't of Justice, *Selection of Monitors in Criminal Division Matters* (Oct. 11, 2018), https://www.justice.gov/opa/speech/file/1100531/download.

54 *See* U.S. DEP'T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS at 14 (June 1, 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.

55 *See* Dylan Tokar, *How the Justice Department Incentivizes Companies to Invest in Compliance*, WALL ST. J. (Dec. 24, 2019), https://www.wsj.com/articles/how-the-justice-department-incentivizes-companies-to-invest-in-compliance-11577183403.



COMPLIANCE OVERSIGHT IN CORPORATE FCPA RESOLUTIONS 2016–2020

On April 14, 2020, the DOJ launched a new webpage that identifies all compliance monitors engaged by corporations as part of a criminal resolution with the DOJ Fraud Section.[56] The monitorship list identifies the companies and their monitors, noting the year when each monitorship began and the specific unit within the Fraud Section overseeing each case.

[56] *See* Monitorships: List of Independent Compliance Monitors for Active Fraud Section Monitorships, U.S. DEP'T OF JUSTICE, https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships (last updated Oct. 16, 2020).

Review of Select Corporate Resolutions

In 2020, the DOJ and the SEC resolved a combined 16 corporate enforcement actions. We summarize below select resolutions from the past year.

Airbus

On January 31, 2020, the DOJ announced that Airbus SE ("Airbus"), a France-based global provider of civilian and military aircraft with U.S.-based subsidiaries and affiliated entities, agreed to pay combined penalties of nearly $4 billion to resolve foreign bribery charges, among other charges, as part of a global resolution with authorities in the United States, the U.K. and France.[57] As part of the resolution, Airbus entered into a three-year deferred prosecution agreement with the DOJ in connection with charges that Airbus conspired to violate the FCPA's anti-bribery provisions and the International Traffic in Arms Regulations ("ITAR"). The DOJ imposed a criminal penalty of nearly $2.1 billion for the FCPA-related offenses, which at the time was the largest FCPA settlement with U.S. enforcement authorities. In related proceedings, Airbus agreed to pay $2.3 billion in penalties to France's Parquet National Financier in connection to bribes paid to government officials and non-government airline executives in China.[58] Airbus also entered into a deferred prosecution agreement with the United Kingdom's Serious Fraud Office ("SFO") and agreed to pay $1.1 billion in penalties over bribes paid in Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana.

The FCPA violations arose out of a scheme involving various Airbus executives paying bribes to consultants and Chinese government officials in exchange for lucrative orders of Airbus's civilian aircraft.[59] According to the DOJ, between 2013 and 2015, Airbus employees and executives paid at least $14 million in bribes to consultants and Chinese officials in order to secure "General Terms Agreements" for at least 140 aircraft. In furtherance of this and other similar schemes, between 2008 and 2015, Airbus's Strategy and Marketing Organization ("SMO")—a division within Airbus that had sole responsibility for managing third-party business partners engaged to assist Airbus in selling planes and services—disguised and concealed the true purpose of the engagement of corrupt business partners by creating fraudulent contracts and invoices, developing investment opportunities that were designed as secret ways to fund business partners, and concealing relationships by indirectly paying certain business partners using fake, non-reimbursable

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57 *See* Deferred Prosecution Agreement, *U.S.* v. *Airbus SE*, No. 20-CR-021 (D.D.C. Jan., 31, 2020), https://www.justice.gov/opa/press-release/file/1241466/download [hereinafter "Airbus DPA"]; Press Release, U.S. Dep't of Justice, *Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case* (Jan. 31, 2020), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case.

58 DOJ credited $1.8 billion of its $2.1 billion criminal penalty toward Airbus's resolution with France's Parquet National Financier. *See* Airbus DPA, at 13.

59 *See id*. at A-8 to A-10, A-22.

loans.[60] Certain employees and executives at Airbus who did not have official roles within the SMO division were aware of and involved in the scheme, and some went so far as to provide lavish travel and entertainment to foreign officials, including events in Park City, Utah and Maui, Hawaii.

As a part of the deferred prosecution agreement, Airbus and the DOJ also resolved charges that Airbus violated the Arms Export Control Act (AECA) and the ITAR. The DOJ noted that its resolution was based on a number of factors, including Airbus's cooperation and remediation, and that the U.S. government recognized that France and the United Kingdom had interests over Airbus's misconduct. The DOJ added that it recognized the strength of France's and the United Kingdom's interests in Airbus's misconduct, and that it took those countries' determinations into account in all aspects of its resolution. Of note, as of December 2020, no individual prosecutions have been initiated in connection with this matter.

Eni S.p.A.

On April 17, 2020, the SEC announced that it had resolved charges against Eni S.p.A., an Italy-based multinational oil and gas company, for violations of the FCPA's recordkeeping and internal accounting controls provisions.[61] Without admitting or denying the SEC's findings, Eni, whose American Depositary Receipts are traded on the New York Stock Exchange and is thus an "issuer" within the meaning of the FCPA, agreed to pay a combined $24.5 million in disgorgement and prejudgment interest. Notably, though the alleged facts involve substantial improper payments to senior foreign public officials to secure billions of dollars in business, and those payments were made with the knowledge and involvement of Eni's CFO, the bribery allegations lack any apparent connection to the territory of the U.S. or the U.S. financial system, and the charges do not include any alleged violations of the FCPA's anti-bribery provisions.

According to the consent order, the charges arose out of an alleged bribery scheme in Algeria between 2007 and 2010 by Saipem S.p.A., in which Eni was a controlling minority shareholder. Saipem allegedly paid an intermediary approximately €198 million ($215 million), a portion of which the intermediary directed to Algerian government officials, including the Energy Minister, in order to obtain business from Algeria's state-owned oil company, Sonatrach.[62] Sonatrach awarded Saipem at least seven contracts worth €8 billion ($8.7 billion).[63] Nonetheless, Saipem's financial statements, which were consolidated into Eni's financial statements, falsely recorded payments to the intermediary as "brokerage fees" in violation of the books-and-records provision of the FCPA. Eni additionally faced charges for failing to use good faith efforts to

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60 *See id*. at A-7.

61 *See In the Matter of Eni S.p.A.*, Exchange Act Release No. 88679 (Apr. 17, 2020), https://www.sec.gov/litigation/admin/2020/34-88679.pdf; Press Release, Sec. Exch. Comm'n, *SEC Charges Eni S.p.A. with FCPA Violations* (Apr. 17, 2020) [hereinafter "Exchange Act Release No. 88679"], https://www.sec.gov/enforce/34-88679-s.

62 Exchange Act Release No. 88679 ¶ 11.

63 *See id*. ¶ 12; Emilio Parodi & Alfredo Faieta, *Italian Appeals Court Acquits Saipem, Eni in Algerian Graft Case*, REUTERS (Jan. 15, 2020), https://www.reuters.com/article/saipem-algeria-corruption/update-1-italian-appeals-court-acquits-saipem-eni-in-algerian-graft-case-idUSL8N29K4ZN.

cause Saipem to devise and maintain a system of internal accounting controls in compliance with the FCPA. This allegation is based in part on the fact that Saipem's then-CFO—who later became Eni's CFO—was aware of and participated in Saipem's illicit conduct during the relevant period.

The relatively modest size of the financial component of the resolution may reflect the absence of bribery charges, the fact of ongoing criminal proceedings in Italy, Eni's controlling minority shareholder status or—given the recent acquittals of Eni, Saipem, Bernini and other Eni senior executives of related corruption charges in Italy—the insufficiency of evidence to prove bribery. The dollar value of Eni's disgorgement—$19.75 million—reflects only its portion of the $57 million in tax deductions, but no amount for any profits derived from the $8.7 billion in contracts awarded by Sonatrach to Saipem in connection with the $215 million in improper payments to the intermediary. This seemingly lenient settlement is equally noteworthy because this is the second FCPA resolution for Eni, having been previously charged by the SEC in 2010 for violations in connection with a scheme in Nigeria by Snamprogetti Netherlands, B.V., Eni's then wholly-owned subsidiary, which was later merged into Saipem.[64] The resolution brings to a close long-running investigations by the DOJ and the SEC that began in 2012 into Eni's activities in Algeria, though the DOJ's September 2019 declination letter notes that the DOJ could re-open its investigation pending the outcome of prosecutions in Italy involving related allegations.

Goldman Sachs

On October 22, 2020, Goldman Sachs Group Inc. and Goldman Sachs (Malaysia) Sdn. Bhd. ("GS Malaysia"), the financial institution's Malaysian subsidiary, admitted to conspiring to violate the FCPA and agreed to pay more than $2.9 billion as part of a coordinated resolution with criminal and civil authorities in the United States, the U.K., Malaysia, Singapore and Hong Kong.[65] According to the charging documents, between 2009 and 2014, various Goldman executives engaged in a scheme to pay more than $1.6 billion in bribes, directly and indirectly, to foreign officials in Malaysia and Abu Dhabi in order to obtain and retain business for Goldman from 1Malaysia Development Berhad ("1MDB"), a Malaysia state-owned investment fund created to pursue development projects. Goldman entered into a deferred prosecution agreement with the DOJ, and GS Malaysia pleaded guilty to a one-count criminal information. Additionally, Goldman entered into a cease-and-desist order with the SEC, agreeing to pay $606.3 million in disgorgement and a $400 million civil penalty, with the amount of disgorgement satisfied by amounts it paid to Malaysia's government in a related settlement.

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64 Exchange Act Release No. 88679 ¶ 8; *see also SEC* v. *Eni, S.p.A. et al.*, No. 4:10-CV-2414 (July 7, 2010), https://www.sec.gov/litigation/complaints/2010/comp-pr2010-119.pdf; Press Release, Sec. Exch. Comm'n, *SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials With Carloads of Cash* (July 7, 2010), https://www.sec.gov/news/press/2010/2010-119.htm.

65 *See* Deferred Prosecution Agreement, *U.S.* v. *Goldman Sachs Group, Inc.*, No. 20-CR-437 (E.D.N.Y. Oct. 22, 2020), https://www.justice.gov/criminal-fraud/file/1329926/download; *In the Matter of Goldman Sachs Group, Inc.*, Exchange Act Release No. 90243 (Oct. 22, 2020), https://www.sec.gov/litigation/admin/2020/34-90243.pdf.

Previously, the DOJ charged Tim Leissner, a former participating managing director of Goldman, and Roger Ng, a former head of investment banking for GS Malaysia, with conspiring to launder money and violate the FCPA in connection with the scheme. Leissner pleaded guilty, and Ng has been extradited from Malaysia to stand trial in March 2021.

Vitol

On December 3, 2020, the DOJ announced a resolution with Vitol, Inc. ("Vitol"), the U.S. affiliate of Geneva-based commodity trading giant Vitol Group, for conspiracy to violate the anti-bribery provisions of the FCPA.[66] In addition to entering into a three-year deferred prosecution agreement, Vitol agreed to pay a $135 million criminal penalty, of which $45 million was credited to Vitol's payment to the Brazilian Ministério Público Federal.

The DOJ's resolution was its first coordinated FCPA resolution with the CFTC. In addition to the penalties it paid the DOJ and Brazilian authorities, Vitol also agreed to disgorge over $12.7 million to the CFTC in a settlement arising from the same conduct, and to pay a $16 million criminal penalty to the CFTC related to energy market manipulation—not covered by the DOJ agreement—that was in violation of Section 6(c)(1) of the Commodities Exchange Act and Regulation 180.1 of the Commission Regulations, which prohibits fraud tied to foreign corruption and manipulation that impacts the U.S. derivatives and related physical markets.[67] Acting AAG Brian C. Rabbitt observed, "[the] coordinated resolution with Brazil, along with our first coordinated FCPA resolution with the CFTC, underscores the department's resolve to hold companies accountable for their crimes while, at the same time, avoiding unnecessary duplicative penalties."[68]

Vitol admitted that, through certain of its employees, intermediaries and affiliates, it bribed several officials at Brazil's state-owned oil company, Petróleo Brasileiro S.A. ("Petrobras"), in exchange for confidential information. Vitol allegedly paid over $5 million in bribes between 2011 and 2014. The bribes were paid to bank accounts controlled by Brazilian officials, who then provided confidential product and pricing information that allowed Vitol to determine its interest and bid amounts for particular Petrobras cargo shipments. The consultants and officials involved in the bribery scheme then facilitated staged negotiations between Petrobras and Vitol for the cargo. To conceal the corrupt payments, Vitol entered into sham consulting agreements with the Brazilian officials. In exchange for the other $3 million in bribes, which allegedly occurred between 2005 and 2014, Vitol received market intelligence, including information

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66 *See* Deferred Prosecution Agreement, *U.S.* v. *Vitol Inc.*, No. 20-CR-539 (E.D.N.Y. Dec. 3, 2020), https://www.justice.gov/opa/press-release/file/1342896/download.

67 *See In the Matter of Vitol Inc.*, CFTC No. 21-01 (Dec. 3, 2020), https://www.cftc.gov/media/5346/enfvitolorder120320/download; Press Release, Commodity Futures Trading Comm'n, *CFTC Orders Vitol Inc. to Pay $95.7 Million for Corruption-Based Fraud and Attempted Manipulation* (Dec. 3, 2020), https://www.cftc.gov/PressRoom/PressReleases/8326-20.

68 Press Release, U.S. Dep't of Justice, *Vitol Agrees to Pay over $135 Million to Resolve Foreign Bribery Case* (Dec. 3, 2020), https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case.

intended to benefit Vitol in trading with Petrobras, and "last look" information, which included confidential bid information that Petrobras received from Vitol's competitors.

Vitol also admitted to a separate bribery scheme, which took place in Ecuador and Mexico between 2015 and 2020. This scheme involved several Vitol employees and agents conspiring to pay over $2 million in bribes to Ecuadorian and Mexican officials in order to obtain and retain business in connection with the purchase and sale of oil products. In 2015, Vitol employees and agents agreed to pay bribes to two Ecuadorian officials in exchange for identifying business opportunities for Vitol and others with Ecuador's state-owned oil company, Petroecuador. Vitol then agreed to pay the consultants who facilitated the scheme per-barrel commission on the oil provided to Vitol in connection with its contract with Petroecuador. During the same time period, Vitol was also paying Mexican officials, through the use of sham consulting agreements and fake invoices, to receive inside information and obtain business.

Enforcement Actions Against Individuals

Based on publicly filed charging instruments, as reflected below, in 2020, the DOJ brought criminal FCPA charges against seven individuals—the lowest number in recent years—and the SEC brought civil charges against three individuals.[69] Both authorities have continued to emphasize individual accountability, with Acting AAG Brian Rabbitt highlighting that "[e]nsuring individual accountability for corporate wrongdoing has been a hallmark" of the DOJ's practice,[70] and Charles Cain, Chief of the SEC Enforcement Division's FCPA Unit, stressing that "individual accountability remains a key component to our FCPA enforcement efforts."[71] As in recent years, in 2020, the DOJ was more active than the SEC in bringing FCPA actions against individuals. The number of individual prosecutions brought by the DOJ under the FCPA is considerably lower than last year, and potentially due to difficulties presented by the pandemic, the DOJ and the SEC numbers are the lowest since 2015.

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69 Included in these totals are individual prosecutions and enforcement actions for FCPA charges, but not for other charges, such as money laundering or racketeering. Actions are listed in the year of the initial filing of FCPA charges, even if unsealed in a later year, which may result in changes to the totals for past years, as indictments from past years are unsealed.

70 *See, e.g.*, Brian C. Rabbitt, Acting Asst. Att'y Gen., U.S. Dep't of Justice, *Remarks at the ACI 37th Annual Conference on the FCPA* (Dec. 3, 2020), https://www.justice.gov/opa/speech/remarks-acting-assistant-attorney-general-brian-c-rabbitt-aci-37th-annual-conference-fcpa.

71 *See* Press Release, Sec. & Exch. Comm'n, *SEC Charges Former Financial Services Executive With FCPA Violations* (Apr. 13, 2020), https://www.sec.gov/news/press-release/2020-88.

FCPA INDIVIDUAL ENFORCEMENT ACTIONS 2016–2020

In 2020, FCPA charges were unsealed against three individuals.[72] The three individuals (Junji Kusunoki, Reza Moenaf and Eko Sulianto) were charged as part of a long-running investigation into alleged corrupt practices by employees of Alstom S.A., a French power and transportation company. Kusunoki was charged in November 2013 with six counts of violating the FCPA and four counts of money laundering.[73] Moenaf and Sulianto were each charged in February 2015 with two counts of violating the FCPA and one count of money laundering.[74] The three individuals were charged in connection with allegations that they paid bribes to officials in Indonesia in exchange for assistance in securing a $118 million contract, known as the Tarahan project, for Alstom's subsidiaries in Connecticut and Indonesia. The three defendants' whereabouts are unknown and the charges remain pending.[75]

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72 *See* Order to Unseal Indictment and Superseding Indictment, *U.S.* v. *Kusunoki, et al.*, No. 3:13-cr-00212 (D. Conn. Feb. 18, 2020).

73 *See* Indictment, *U.S.* v. *Kusunoki, et al.*, No. 3:13-CR-00212 (D. Conn. Nov. 14, 2013).

74 *See* Superseding Indictment, *U.S.* v. *Kusunoki, et al.*, No. 3:13-CR-00212 (D. Conn. Feb. 26, 2015).

75 *See* Press Release, U.S. Dep't of Justice, *Former Alstom Executives and Marubeni Executive Charged with Bribing Indonesian Officials* (Feb. 18, 2020), https://www.justice.gov/opa/pr/former-alstom-executives-and-marubeni-executive-charged-bribing-indonesian-officials.

Six individuals pleaded guilty to FCPA charges in 2020.[76] Among these individuals was Deck Won Kang, a New Jersey resident who controlled two U.S.-based closely held companies, who pleaded guilty to one count of violating the FCPA's anti-bribery provisions.[77] Kang pleaded guilty in connection with a promise to pay a high-ranking official in the Korean Navy a sum to be determined when the official left public office in exchange for non-public information relating to goods and services contracts with the Defense Acquisition Program Administration ("DAPA"), a state-owned and state-controlled agency within the Republic of Korea's Ministry of National Defense. Kang admitted that in order to fulfill his bribe promise to the Korean official, between April 2012 and February 2013, and following the official's retirement from DAPA, Kang made bribe payments totaling $100,000 to a bank account in Australia for the benefit of the Korean official.

Two individuals settled civil FCPA charges with the SEC in 2020.[78] According to the SEC, the two individuals engaged in a bribery scheme to facilitate the acquisition of a U.S.-based chicken and pork producer and distributor ("the U.S. issuer") by JBS S.A., a Brazil-based meat and protein producer. The SEC order states that the two individuals agreed to pay bribes to and at the direction of the former Brazil Finance Minister in return for his assistance in ensuring JBS obtained and maintained a large equity investment by BNDES, a Brazilian state-controlled bank. The investment agreement included language that a portion of the proceeds would be used to acquire a controlling interest in the U.S. issuer. According to the SEC's order, the two individuals paid approximately $150 million in bribes to the former Brazil Finance Minister and various other political candidates in Brazil using funds from intercompany transfers, among other sources. The two individuals consented to the SEC's order finding that, as board members and executives of both JBS and the U.S. issuer, they caused JBS's violations of the FCPA's books and records and internal accounting controls provisions. The individuals each agreed to pay a civil penalty of $550,000 and, although they were not barred from future service as directors, they resigned from board and management positions at JBS.

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76 *See* Press Release, U.S. Dep't of Justice, *New Jersey Man Pleads Guilty to Violating the Foreign Corrupt Practices Act* (Dec. 17, 2020), https://www.justice.gov/opa/pr/new-jersey-man-pleads-guilty-violating-foreign-corrupt-practices-act; Press Release, U.S. Dep't of Justice, *Sargeant Marine Inc. Pleads Guilty and Agrees to Pay $16.6 Million to Resolve Charges Related to Foreign Bribery Schemes in Brazil, Venezuela, and Ecuador* (Sept. 22, 2020), https://www.justice.gov/opa/pr/sargeant-marine-inc-pleads-guilty-and-agrees-pay-166-million-resolve-charges-related-foreign; Press Release, U.S. Dep't of Justice, *Miami-Based Businessman Pleads Guilty to FCPA and Money Laundering Violations in Scheme Involving PetroEcuador Officials* (Jan. 23, 2020), https://www.justice.gov/opa/pr/miami-based-businessman-pleads-guilty-fcpa-and-money-laundering-violations-scheme-involving; *U.S.* v. *Farias-Perez*, No. 4:20-CR-00089 (Feb. 19, 2020), ECF No. 8.

77 *See* Plea Agreement, *United States* v. *Kang*, No. 2:20-CR-01077 (D.N.J. Dec. 17, 2020).

78 *See In the Matter of J&F Investimentos, S.A., et al.*, Exchange Act Release No. 90170 (Oct. 14, 2020), https://www.sec.gov/litigation/admin/2020/34-90170.pdf.

Legal Developments Affecting Enforcement Tools

In 2020, significant legal developments affected the DOJ's and the SEC's tools for enforcing the FCPA and resolving cases. *First*, the Securities Exchange Act of 1934 (the "Exchange Act") was amended to provide the SEC, for the first time, with statutory authority to seek disgorgement as a remedy in federal court and to establish a 10-year statute of limitations for disgorgement and equitable remedies. The passage of these amendments follows the U.S. Supreme Court's decision in *Liu* v. *SEC*, where the Court held that the SEC can indeed collect disgorgement in enforcement actions, subject to certain limitations. *Second*, in *United States* v. *Hoskins*, the United States District Court for the District of Connecticut limited the FCPA's extraterritorial reach by overturning a foreign national's FCPA convictions, finding that the prosecutors did not establish an agency-relationship between the foreign national and his company's U.S. subsidiary. *Third*, in *SEC* v. *Fowler*, the Second Circuit was presented with an issue of first impression—whether SEC tolling agreements are enforceable under 28 U.S.C. § 2462, which provides that an enforcement action "shall not be entertained" unless it is brought within five years from the date the claim accrued. These legal developments and their potential implications are discussed below.

Liu v. SEC

In December 2020, Congress passed the NDAA, which included a section amending Section 21(d) of the Exchange Act to provide the SEC with statutory authority to seek disgorgement as a remedy in federal court actions and to establish a 10-year statute of limitations for disgorgement and equitable remedies for scienter-based violations.[79] In 2017, the Supreme Court had characterized disgorgement as a "penalty" rather than an equitable remedy in *Kokesh* v. *SEC*.[80] On June 22, 2020, in *Liu* v. *SEC*, the Supreme Court addressed the question it left open in *Kokesh*—whether the SEC has the authority to obtain disgorgement for a securities law violation pursuant to its statutory authority to obtain equitable relief.[81] In an 8-1 opinion written by Justice Sotomayor, the Supreme Court answered that question in the affirmative.

In *Liu*, a SEC civil enforcement action alleging violations of the federal securities laws, the U.S. District Court for the Central District of California granted summary judgment to the SEC and ordered petitioners to disgorge over $26 million. On appeal, the Ninth Circuit affirmed the district court's disgorgement order. Petitioners filed a petition for a writ for certiorari, asking the Supreme Court to review the question "[w]hether the Securities and Exchange Commission may seek and obtain disgorgement from a court as

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79 H.R. 6395, 116th Cong. § 6501 (2020).

80 137 S. Ct. 1635 (2017); *see also* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, U.S. Supreme Court Holds That Five-Year Statute of Limitations Applies to Claims for Disgorgement Brought by the SEC (June 6, 2017), https://www.paulweiss.com/media/3977137/6june17-kokesh.pdf.

81 140 S. Ct. 1936 (2020); *see also* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Supreme Court Upholds the SEC's Authority to Seek Disgorgement in Civil Actions, But Imposes Important Limiting Principles (June 25, 2020), https://www.paulweiss.com/media/3980335/25june20-liu-v-sec.pdf.

'equitable relief' for a securities law violation even though this Court has determined that such disgorgement is a penalty."[82]

The Supreme Court upheld the SEC's ability to collect disgorgement in enforcement actions so long as the disgorgement amount does not exceed a defendant's net profits from the conduct at issue and is awarded for the purpose of compensating victims.[83] The Court also limited the SEC's ability to use disgorgement without considering and deducting legitimate business expenses associated with the sales amount from the corrupt activity. Previously, the SEC has ordered companies to disgorge the total sales amount from the corrupt activity, without taking into account legitimate expenses.

As a result of *Liu*, if a company did not profit from a corrupt activity, the SEC may not be able to use disgorgement as part of a settlement. The impact of *Liu*, however, remains to be seen as the NDAA's amendments providing the SEC with statutory authority to seek disgorgement do not address the limiting principles set forth in *Liu*. As Stephanie Avakian, former co-director of the SEC Enforcement Division, commented, prior to the passage of the NDAA, the Commission is "dedicating resources to evaluating the impact of [the *Liu*] decision" and, as a result, companies may "expect to see some changes in the balance between the penalties and disgorgement" that the SEC seeks, with higher penalties in cases "where the statutory scheme permits."[84]

United States v. Hoskins

On February 26, 2020, Judge Janet Bond Arterton in the United States District Court for the District of Connecticut overturned the FCPA convictions of Lawrence Hoskins, a British citizen and a former senior executive of the French power and rail transportation company Alstom S.A., after finding that prosecutors failed to prove at trial that Hoskins was an agent of the company's U.S. subsidiary, Alstom Power Inc. ("API").[85] The court declined to overturn Hoskins's related convictions for money laundering.

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82 Petition for Writ of Certiorari at i, *Liu*, 140 S. Ct. 1936.

83 *Liu*, 140 S. Ct. at 1940.

84 *See* Stephanie Avakian, Director, Sec. & Exch. Comm'n, *Remarks at the Institute for Law and Economics, University of Pennsylvania Carey Law School Virtual Program* (Sept. 17, 2020), https://www.sec.gov/news/speech/avakian-protecting-everyday-investors-091720.

85 *United States* v. *Hoskins*, No. 3:12-CR-238 (JBA), 2020 WL 914302 (D. Conn. Feb. 26, 2020); *see also* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, 2020 FCPA Developments: A Judge Overturns Hoskins's FCPA Guilty Verdict Under An Agency Theory; Cardinal Health Resolves FCPA Investigation with SEC (Mar. 13, 2020), https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/2020-fcpa-developments-a-judge-overturns-hoskins-s-fcpa-guilty-verdict-under-an-agency-theory?id=30860.

In July 2013, Hoskins was indicted for his role in a scheme to bribe Indonesian officials to secure an infrastructure project valued at $118 million. To conceal the bribes, API retained two consultants to serve as conduits for the payments to the Indonesian government officials.

Under the FCPA, the DOJ may only prosecute defendants who have a specific nexus to the U.S.: (i) "issuers" of securities listed on U.S. stock exchanges that use any "instrumentality of interstate commerce" in furtherance of the illicit conduct;[86] (ii) "domestic concerns," or American individuals or companies and their employees, officers or directors;[87] or (iii) foreign persons who were physically present within the U.S. when the violation occurred.[88] Hoskins was never physically present in the U.S. while the bribery scheme was ongoing and was not directly employed by API, but the DOJ charged Hoskins under the FCPA on the ground that he was an agent of API, a "domestic concern." Hoskins was also charged with money laundering and money laundering conspiracy.

In October 2019, the case proceeded to trial where the central issue was whether Hoskins acted as an agent of API, and the jury returned a verdict finding Hoskins guilty on all FCPA charges and all but one money laundering charge. Hoskins asserted in a post-trial motion that the government did not prove he was an agent of API because there was no evidence showing that API had control over his work, "let alone in connection with the retention of consultants" on the infrastructure project.[89]

In its February 2020 decision overturning Hoskins's FCPA convictions, the Court considered whether API had authority to instruct Hoskins, control his performance and terminate his employment.[90] In the highly fact-based opinion, the Court found that there was no evidence showing that Hoskins agreed to act subject to API's control, that API controlled Hoskins's actions to hire consultants, or that API could terminate Hoskins's authority, which the Court considered "especially important." Thus, the Court found that no principal-agency relationship existed between API and Hoskins and, accordingly, overturned Hoskins's convictions on all FCPA charges. The Court found, however, that the prosecutors presented sufficient evidence to support the money laundering convictions.

On March 6, 2020, Hoskins was sentenced to 15 months in prison and fined $30,000 on the money laundering charges. On March 9, the DOJ filed a notice of appeal seeking reversal of Judge Arterton's decision to overturn Hoskins's FCPA convictions and a reinstatement of those convictions.[91] While Judge Arterton's decision and the Second Circuit's 2018 decision constrain the DOJ's attempts to use secondary

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86 15 U.S.C. § 78dd-1.

87 15 U.S.C. § 78dd-2.

88 15 U.S.C. § 78dd-3.

89 *Id.* at 6.

90 *Hoskins*, 2020 WL 914302, at *5–7.

91 Notice of Appeal, *United States* v. *Hoskins*, No. 3:12-CR-238 (JBA) (D. Conn. Mar. 9, 2020).

theories of liability to expand the FCPA's extraterritorial reach, the full impact of these decisions remains to be seen.

SEC v. Fowler

As discussed above, the Exchange Act was amended in December 2020 to establish a 10-year statute of limitations for the SEC to pursue disgorgement and other equitable remedies—doubling the current statute of limitations in certain classes of cases. In August 2020, before the passage of the amendment, the Second Circuit was presented with an issue of first impression but one that commentators have recently raised: whether SEC tolling agreements, which have routinely extended the then-five-year statutory window for the SEC to file enforcement actions, are enforceable in court.[92] Under 28 U.S.C. § 2462, an enforcement action "shall not be entertained" unless it is brought within five years from the date the claim accrued. Parties and courts have viewed this provision as a typical statute of limitations that can be tolled through private contract, rather than as a jurisdictional time limit that cannot be waived. In *SEC* v. *Fowler*, however, counsel for defendant-appellant argued in his opening brief that Section 2462, unlike typical statutes of limitations, does not focus on when the plaintiff must file an action, but rather on whether the tribunal may "entertain" the action.[93]

Defendant-appellant Donald Fowler, a former New York-based broker, had entered into two tolling agreements with the SEC with respect to claims arising out of an investigation into a 2011 trading scheme that generated large commissions for Fowler and significant losses for his clients.[94] The SEC filed an enforcement action against Fowler in 2017, and the United States District Court for the Southern District of New York entered a final judgment against Fowler in February 2020.[95]

On appeal, Fowler challenged whether the district court had subject matter jurisdiction under Section 2462 where the SEC, in relying on the tolling agreement, commenced the enforcement action more than five years after the claims accrued.[96] The impact of the Second Circuit's ultimate ruling is likely to be limited, however, in light of the expansion of the statute of limitations to ten years in the NDAA.

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92 *See* Brief for Defendant-Appellant Donald J. Fowler, *SEC* v. *Fowler*, No. 20-cv-1081 (Aug. 6, 2020), ECF No. 39.

93 *Id*. at 18-23.

94 *See* Memorandum Opinion and Order, *SEC* v. *Fowler*, No. 1:17-cv-139 (Feb. 25, 2020), ECF No. 201; *see also* Press Release, Sec. & Exch. Comm'n, *SEC Obtains Final Judgment Against Broker Found Liable by Jury for Defrauding Customers* (Mar. 2, 2020), https://www.sec.gov/litigation/litreleases/2020/lr24756.htm.

95 *See* Final Judgement as to Defendant Donald J. Fowler, *SEC* v. *Fowler*, No. 1:17-cv-139 (Feb. 28, 2020), ECF No. 205.

96 Brief for Defendant-Appellant Donald J. Fowler, *SEC* v. *Fowler*, No. 20-cv-1081 (Aug. 6, 2020), ECF No. 39.

Foreign Jurisdictions Investigating and Prosecuting Corruption

In addition to the U.S., other countries took significant strides to investigate and prosecute corrupt actors. Authorities in numerous countries announced investigations and prosecutions of allegedly corrupt officials and a startling number of current and former foreign government officials, including former heads of state, were convicted and sentenced in connection with corruption charges. Foreign authorities in several jurisdictions also continued to pursue corporate enforcement actions. In addition, a number of foreign jurisdictions acted to enhance their anti-corruption laws.

Africa

In **South Africa**, the National Prosecuting Authority has charged Ace Magashule, the secretary general of South Africa's governing African National Congress, with 21 counts including corruption, for accepting bribe payments and facilitating the award of a government contract worth nearly $15 million to survey low-income houses built with asbestos.[97]

In **Angola**, Isabel dos Santos, Africa's richest woman and the daughter of Angola's former president, has been charged with corruption for embezzling more than $57 million during her tenure as chairwoman of Sonangol, Angola's state oil company.[98]

Nigeria's Economic and Financial Crimes Commission brought corruption charges against Mohammed Adoke, Nigeria's former attorney general, for allegedly receiving approximately $980,000 in bribes to facilitate the $1.3 billion sale of an offshore oilfield by Malabu Oil and Gas and, separately, for helping waive taxes for Royal Dutch Shell, a British-Dutch energy company, and Eni S.p.A., an Italian energy company.[99]

Asia

In **China**, Sun Deshun, the former president of China CITIC Bank Corporate Limited, a state-owned entity and China's seventh-largest lender, was indicted by the Supreme People's Procuratorate over bribery charges.[100] Xiang Junbo, the former chairman of the China Insurance Regulatory Commission, was sentenced to 11 years in prison, fined $200,000 USD and had his assets confiscated for accepting $2.6

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97 *Top A.N.C. Official Charged With Corruption in South Africa*, N.Y. TIMES (Nov. 13, 2020), https://www.nytimes.com/2020/11/13/world/africa/anc-corruption-south-africa.html.

98 *Africa's Richest Woman Set to Face Charges in Angola Over Embezzlement*, N.Y. TIMES (Jan. 23, 2020), https://www.nytimes.com/2020/01/23/world/africa/angola-santos-embezzlement.html.

99 *Nigeria Charges Ex-Attorney General in Court Over $1.3 Billion Oil Deal*, REUTERS (Jan. 23, 2020), https://uk.reuters.com/article/us-nigeria-oil/nigeria-charges-ex-attorney-general-in-court-over-1-3-billion-oil-deal-idUKKBN1ZM2QN.

100 *Former Head of China CITIC Bank Indicted for Bribery*, CHINA DAILY (May 13, 2020), https://www.chinadaily.com.cn/a/202005/13/WS5ebbbb72a310a8b241155734.html.

million in bribes between 2005 and 2017.[101] Ren Zhiqiang, a real estate mogul and the former chairman of a Chinese state-owned property company, was sentenced to 18 years in prison on corruption charges for misappropriating more than $16.3 million, receiving bribes valued at more than $184,000 and causing Chinese state-owned companies to lose around $17.2 million between 2003 and 2017.[102]

The Chinese government enacted a "blocking statute"—the Law on International Criminal Judicial Assistance ("ICJAL")—that has continued impacting how investigations are conducted and how companies may cooperate or share information with authorities outside China. The ICJAL prohibits individuals and entities in China from providing foreign countries with evidence or assistance in criminal investigations, absent authorization from Chinese authorities.[103] The legislation purportedly is intended to strengthen international cooperation without harming China's sovereignty, security, and social interests, or violating China's laws but is widely perceived as an attempt to harden China's borders against extraterritorial enforcement of foreign anti-corruption and other extraterritorial laws. The ICJAL provides general procedures for obtaining approval of requests for criminal investigation assistance, but defers to applicable mutual legal assistance treaties ("MLATs"). However, the MLAT between China and the U.S. is used infrequently and had not been a reliable mechanism for obtaining evidence.

In **Japan**, Masahiko Konno and Katsunori Nakazato, two former advisers to 500.com Ltd., a Chinese gambling operator, pleaded guilty to charges of bribing Tsukasa Akimoto, a lawmaker in Japan's House of Representatives, to help 500.com's bid to operate an integrated resort casino in Japan, in connection with the introduction of casino resorts to Japan.[104] Mikio Shimoji, a member of Japan's national legislature, admitted to receiving approximately $9,000 dollars in campaign contributions from 500.com Ltd.[105]

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101 Yujing Liu, *China Sends Former Insurance Regulator Xiang Junbo to 11 years in Prison*, SOUTH CHINA MORNING POST (June 16, 2020), https://www.scmp.com/business/companies/article/3089283/china-sends-former-insurance-regulator-xiang-junbo-11-years.

102 Chun Han Wong, *China Sentences Xi Critic Ren Zhiqiang to 18 Years in Prison*, WALL. ST. J. (Sept. 22, 2020), https://www.wsj.com/articles/china-sentences-xi-critic-ren-zhiqiang-to-18-years-in-prison-11600755598.

103 *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, FCPA Enforcement and Anti-Corruption: 2018 Year in Review (Jan. 27, 2019), https://www.paulweiss.com/practices/litigation/anti-corruption-fcpa/publications/fcpa-enforcement-and-anti-corruption-developments-2018-year-in-review?id=28109; *China Adopts Law to Facilitate Int'l Judicial Cooperation*, NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REP. OF CHINA (Oct. 29, 2018), http://www.npc.gov.cn/englishnpc/news/Legislation/2018-10/29/content_2064964.htm.

104 *Ex-Advisers to Chinese Firm Admit Bribing Lawmaker Tsukasa Akimoto*, JAPAN TIMES (Aug. 26, 2020), https://www.japantimes.co.jp/news/2020/08/26/national/crime-legal/china-casino-bribes-tsukasa-akimoto/.

105 *Nippon Ishin Lawmaker Mikio Shimoji Admits Taking Money in Casino Scandal*, JAPAN TIMES (Jan. 6, 2020), https://www.japantimes.co.jp/news/2020/01/06/national/crime-legal/nippon-ishin-mikio-shimoji-casino-scandal/.

The **Malaysia** High Court sentenced Najib Razak, the former Prime Minister of Malaysia, to 12 years in jail after finding him guilty on seven charges related to the 1MDB scandal.[106] Najib was found guilty of all counts brought against him, including abuse of power, money laundering and criminal breach of trust, in connection with $10 million of funds deposited into his personal accounts from a former unit of 1MDB.

The Supreme Court of **South Korea** upheld a 17-year prison term for Lee Myung-bak, South Korea's former president, and ordered him sent back to prison.[107] Lee, who was president from 2008 to 2013, allegedly collected bribes from Samsung in the form of lawyer fees that Samsung paid to settle a lawsuit involving Das, a South Korea-based auto parts company.

Europe and the Middle East

In **France**, former President Nicolas Sarkozy stood trial on corruption charges for attempting to bribe a magistrate in an effort to obtain confidential information about a police inquiry into the finances of his 2007 campaign.[108] Prosecutors have requested two years of prison and a two-year suspended sentence for Sarkozy, and a verdict is expected on March 1, 2021.

Lamine Diack, the former head of World Athletics, the international governing body for world athletics, was convicted on corruption charges in France and sentenced to four years in jail.[109] Diack was found guilty of soliciting bribes totaling $4.1 million from athletes in return for concealing positive drug tests, which enabled the athletes to continue competing, including at the 2012 London Olympics.

In **Israel**, Benjamin Netanyahu was formally indicted on corruption charges and his trial commenced after the prime minister withdrew his request for parliamentary immunity from prosecution.[110] Netanyahu is charged with bribery, breach of trust and fraud in connection with allegations that he accepted $264,000 worth of gifts from tycoons and provided regulatory favors in exchange for improved coverage by a popular

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106 Richard C. Paddock, *Najib Razak, Malaysia's Former Prime Minister, Found Guilty in Graft Trial*, N.Y. TIMES (July 28, 2020), https://www.nytimes.com/2020/07/28/world/asia/malaysia-1mdb-najib.html.

107 Choe Sang-Hun, *Former South Korean President Ordered Back to Prison for Bribery*, N.Y. TIMES (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/world/asia/south-korea-president-bribery.html.

108 Aurelien Breeden, *Corruption Trial of Ex-President Sarkozy Opens in France*, N. Y. TIMES (Nov. 23, 2020), https://www.nytimes.com/2020/11/23/world/europe/sarkozy-corruption-trial-france.html; *Sarkozy Corruption Trial Comes to a Close, with Verdict Expected March 1*, FRANCE 24 (Dec. 11, 2020), https://www.france24.com/en/europe/20201211-sarkozy-corruption-trial-comes-to-a-close-with-verdict-expected-march-1.

109 Tangi Salaün, *Ex-Head of World Athletics Diack Given Jail Sentence for Corruption*, REUTERS (Sept. 16, 2020), https://www.reuters.com/article/us-athletics-corruption/ex-head-of-world-athletics-diack-gets-jail-for-corruption-idUSKBN26724L.

110 David M. Halbfinger, *Netanyahu Corruption Trial Begins, Taking Israel Into Uncharted Territory*, N.Y. TIMES (May 24, 2020), https://www.nytimes.com/2020/05/24/world/middleeast/israel-benjamin-netanyahu-corruption-trial.html.

news website. The trial is expected to last a year or more, with the first witnesses not expected to testify until 2021.

Benny Gantz, Israel's defense minister, established a governmental commission of inquiry into the multibillion-dollar purchase of submarines and missile boats from Germany under Netanyahu's government.[111] The commission's findings are expected to be published in early 2021.

Ukraine's anti-corruption campaign—a key condition of the International Monetary Fund's bailout financing for Ukraine—has been thrown into doubt after a top court ruled that the National Anti-Corruption Bureau of Ukraine ("NABU"), the country's main anti-graft body, is in breach of the Constitution.[112] Petro Poroshenko, the former president of Ukraine, established NABU in 2014 to spearhead anti-corruption efforts independently from the country's law enforcement and judicial systems.

The **United Kingdom**'s Serious Fraud Office ("SFO") for the first time published its internal Operational Handbook's guidance on how it evaluates an organization's compliance programs,[113] as well as the Operational Handbook's chapter on deferred prosecution agreements ("DPAs"), offering "comprehensive guidance" for how the SFO "engages with companies where a DPA is a prospective outcome."[114] The guidance was published "in the interests of transparency" and is not binding.

Ziad Akle, a former Iraq territory manager for Monaco-based oil-services firm Unaoil, and Stephen Whiteley, a former vice president at SBM Offshore NV, a Dutch oil company, were found guilty of conspiracy to make corrupt payments following a jury trial.[115] According to prosecutors, Akle and Whiteley paid more than $500,000 to public officials in Iraq to win a $55 million contract for offshore mooring buoys for Unaoil and its client, SBM Offshore.

Latin America

In **Brazil**, the sweeping anti-corruption investigation known as Operation Car Wash (or "Lava Jato") entered its 76th phase, despite political opposition from President Jair Bolsonaro and resignations from

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111 Isabel Kershner, *Israeli Panel to Look Into Submarine Scandal, Riling Netanyahu*, N.Y. TIMES (Dec. 2, 2020), https://www.nytimes.com/2020/11/22/world/middleeast/israel-netanyahu-submarine-scandal.html.

112 Roman Olearchyk, *Ukraine Anti-Corruption Drive in Doubt After Court Ruling*, FINANCIAL TIMES (Sept. 17, 2020), https://www.ft.com/content/f014fe13-7381-4efc-a492-48f80ac01d99.

113 *Evaluating a Compliance Programme*, U.K. SERIOUS FRAUD OFFICE (Jan. 2020), https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/evaluating-a-compliance-programme/.

114 *Deferred Prosecution Agreements*, U.K. SERIOUS FRAUD OFFICE (Oct. 2020), https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/deferred-prosecution-agreements/.

115 Mengqi Sun, *Two Former Unaoil Managers Convicted on U.K. Bribery Charges*, WALL ST. J. (July 13, 2020), https://www.wsj.com/articles/two-former-unaoil-managers-convicted-on-u-k-bribery-charges-11594657867.

leaders of the anti-corruption task force, including Sergio Moro, the former Minister of Justice of Brazil, and Deltan Dallagnol, the lead prosecutor of Operation Car Wash.[116]

Federal prosecutors served 25 search warrants related to foreign exchange transactions between 2008 and 2011 as part of the next phase in Operation Car Wash.[117] According to prosecutors, financial directors at Petrobras artificially manipulated market rates by directing forex contracts worth $1.45 billion to Banco Paulista, a São Paulo-based financial firm.

Authorities arrested German Efromovich and Jose Efromovich, majority shareholders of Avianca Holdings, the Colombia-based airline, as part of Operation Car Wash.[118] According to prosecutors, the Efromovich brothers laundered money and bribed public officials in order to secure ship-building contracts with Transpetro, the logistics unit of Petrobras, Brazil's state-owned oil company.

Brazilian law enforcement authorities are investigating Jose Larocca and Mike Wainwright, high-level executives at Trafigura, a Singapore-based multinational commodity trading company, on allegations that the executives approved bribery schemes involving employees at Petrobras, Brazil's state-controlled oil producer.[119] In a parallel civil lawsuit filed against Trafigura in early December 2020, Brazilian prosecutors accused Trafigura of bribing Petrobras employees in 31 fuel oil transactions between May 2012 to October 2013.

Brazil's Federal Prosecution Service ("MPF") entered into a leniency agreement with Philips N.V., a Netherlands-based multinational health technology company.[120] Philips agreed to pay a $11.6 million fine

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116 Bryan Harris, *Lead Prosecutor Quits Brazil's 'Lava Jato' Probe*, FINANCIAL TIMES (Sept. 1, 2020), https://www.ft.com/content/20dffdd9-05e6-442a-a1ac-c25335a863b6; Murilo Fagundes, Bolsonaro Says Brazil Is Corruption-Free, Ends Carwash Probe, Bloomberg (Oct. 7, 2020), https://www.bloomberg.com/news/articles/2020-10-07/bolsonaro-declares-brazil-corruption-free-and-ends-carwash-probe.

117 *Brazil's 'Car Wash' Probe Targets Petrobras Forex Transactions*, REUTERS (Sept. 10, 2020), https://www.reuters.com/article/us-brazil-corruption-petrobras/brazils-car-wash-probe-targets-petrobras-forex-exchange-transactions-idUSKBN261229

118 *Avianca Airline Magnates Held in Brazil Graft Probe*, FRANCE 24 (Aug. 20, 2020), https://www.france24.com/en/20200820-avianca-airline-magnates-held-in-brazil-graft-probe.

119 Sabrina Valle, *Brazil Pursues Criminal Probe of Top Trafigura Executives*, REUTERS (Dec. 15, 2020), https://www.reuters.com/article/us-brazil-corruption-trafig/exclusive-brazil-pursues-criminal-probe-of-top-trafigura-executives-sources-idUSKBN28P1K3.

120 James Thomas, *Philips Resolves Brazilian Medical Device Bribery Probe*, GLOB. INVESTIGATIONS REV. (Dec. 10, 2020), https://globalinvestigationsreview.com/news-and-features/investigators-guides/brazil/article/philips-resolves-brazilian-medical-device-bribery-probe.

to resolve charges that the company paid bribes to public officials in Brazil's Ministry of Health and Rio de Janeiro's Secretariat of Health in exchange for public health contracts.

Brazil state prosecutors filed a 300-page indictment against Flávio Bolsonaro—a federal senator in Brazil and the son of Jair Bolsonaro, Brazil's president—for alleged embezzlement, money laundering and running a criminal organization.[121]

Peru's Congress impeached President Martín Vizcarra for corruption. Vizcarra allegedly received hundreds of thousands of dollars in bribes from construction companies while he was a state governor from 2011 to 2014. Prosecutors announced a criminal investigation into the allegations against Vizcarra but have not brought any charges.[122]

North America

In **Mexico**, Emilio Lozoya Austin, the former head of Petróleos Mexicanos (Pemex), Mexico's state-owned oil firm, was arrested in Spain and extradited to Mexico to face corruption charges.[123] Lozoya has accused Enrique Peña Nieto, Mexico's former president, and Luis Videgaray, Peña Nieto's former finance minister, of election-related corruption. Mexico's attorney general announced an investigation into the allegations, but neither Peña Nieto nor Videgaray have been charged.

Multilateral Development Bank Sanctions

In 2020, as in recent years, multilateral development banks ("MDBs") continued to evolve their debarment practices, sanctioning significantly more individuals and entities than in prior years. The World Bank Group imposed 139 debarments, the African Development Bank imposed 82, the Inter-American Development Bank imposed 33, the Asian Development Bank imposed 12 and the European Bank for Reconstruction and Development imposed five.[124] Twenty-seven of the debarments imposed by the African

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121 *Brazil Prosecutors Bring Graft Charges Against Bolsonaro's Son*, REUTERS (Sept. 28, 2020), https://www.reuters.com/article/us-brazil-corruption/brazil-prosecutors-bring-graft-charges-against-bolsonaros-son-report-idUSKBN26J38N.

122 Ryan Dube, *Peru Hit by Political Crisis as Congress Ousts President*, WALL ST. J. (Sept. 28, 2020), https://www.wsj.com/articles/perus-congress-votes-to-impeach-president-martin-vizcarra-following-corruption-accusations-11604968650.

123 Juan Montes, *Ex-Mexican President Enrique Peña Nieto Accused of Corruption by Former State-Oil Chief*, WALL ST. J. (Sept. 28, 2020), https://www.wsj.com/articles/ex-mexican-president-enrique-pena-nieto-accused-of-corruption-by-former-state-oil-chief-11597189321.

124 Debarments were counted based on the data reported by each MDB, using each bank's own reporting criteria. *See Debarment and Sanctions Procedures*, AFRICAN DEV. BANK GRP., https://www.afdb.org/en/projects-and-operations/procurement/debarment-and-sanctions-procedures/; *Published List*, ASIAN DEV. BANK, http://lnadbg4.adb.org/oga0009p.nsf/sancALLPublic?OpenView&count=999; *Ineligible Entities*, EUROPEAN BANK FOR RECONSTRUCTR. AND DEV.,

Development Bank and nine of the debarments imposed by the World Bank were based, at least in part, on corrupt practices. The Inter-American Development Bank, the Asian Development Bank and the European Bank for Reconstruction and Development do not appear to have imposed any debarments based on corrupt practices. The extent to which MDBs imposed debarments based on corrupt practices represents a marked increase from recent years, during which many of the MDBs did not impose any such debarments.

Unfortunately, limited conclusions about MDB corruption enforcement can be drawn from this data. Debarments of affiliates of the same company generally are reported as separate debarments, such that debarment statistics do not reflect the number of distinct investigations that have resulted in debarments.

The Administration Transition, COVID-19 and Looking Forward into 2021

As we predicted last year, U.S. authorities have continued to focus on themes such as individual accountability, providing companies with incentives for self-disclosure and cooperation, corporate compliance, transparency, multi-jurisdictional coordination and international cooperation. Despite the temporary challenges created by the global pandemic in 2020 and likely into 2021, the DOJ and the SEC have continued to enforce the FCPA and engage in increasing international coordination.

During the Trump Administration, the DOJ and the SEC imposed record penalties under the FCPA. Notably, many of the enforcement actions resolved under the Trump Administration involved pre-existing, years-long investigations (e.g., Walmart, TechnipFMC, Mobile TeleSystems PJSC, Telia) and investigations initiated and developed by foreign authorities (e.g., Airbus, Petrobras, SBM Offshore, Keppel Offshore). It is difficult to draw many conclusions on the enforcement priorities during the Trump Administration as it is very difficult to discern how many FCPA investigations were begun by the DOJ and the SEC in the last four years.

It would be surprising if FCPA enforcement did not accelerate under the Biden Administration. Although the new administration has yet to complete appointing new leadership at the DOJ, the SEC and other key enforcement agencies, we do not have any reasons at this time to anticipate dramatic changes in either agencies' commitment of resources to FCPA enforcement or their emphasis on the importance of developing and maintaining effective compliance programs. At a minimum, it will be some time before the

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http://www.ebrd.com/ineligible-entities.html (including debarments based upon third-party findings); *Sanctioned Firms and Individuals*, INTER-AMERICAN DEV. BANK, http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/sanctioned-firms-and-individuals,1293.html; *World Bank Listing of Ineligible Firms & Individuals*, WORLD BANK, http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984. The World Bank Group appears to report only current debarments; the debarment totals are based upon the data reported as of December 2020. The African Development Bank does not specify the grounds for its debarments; those grounds were counted based upon information reported by the Asian Development Bank and African Development Bank press releases.

dust settles and the new DOJ and SEC leadership put their own stamp on FCPA enforcement, anti-corruption compliance, and related policies.

Finally, looking abroad, although the DOJ and the SEC recovered a record-breaking combined $2.6 billion in corporate resolutions, the nearly $2.9 billion assessed by foreign authorities in those cases suggests that foreign countries are maturing in their efforts to enforce their anti-corruption laws and denotes an equally remarkable effort to coordinate with foreign authorities investigating and prosecuting global corruption. Given the significant shifts in international relations and global economic competition in the past year, it remains to be seen what impact such international cooperation will have on future enforcement actions.

Countries across the globe have continued to develop their domestic anti-corruption laws, and new corruption scandals and prosecutions blossom with regularity. We expect that trend to continue next year.

We look forward to providing you with further updates on these and other developments in 2021.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Jessica S. Carey
+ 1-212-373-3566
jcarey@paulweiss.com

Roberto Finzi
+1-212-373-3311
rfinzi@paulweiss.com

Harris Fischman
+1-212-373-3306
hfischman@paulweiss.com

Christopher D. Frey
+81-3-3597-6309
cfrey@paulweiss.com

Michael E. Gertzman
+1-212-373-3281
mgertzman@paulweiss.com

Roberto J. Gonzalez
+1-202-223-7316
rgonzalez@paulweiss.com

Michele Hirshman
+1-212-373-3747
mhirshman@paulweiss.com

Brad S. Karp
+1-212-373-3316
bkarp@paulweiss.com

Loretta E. Lynch
+1-212-373-3000

Mark F. Mendelsohn
+1-202-223-7377
mmendelsohn@paulweiss.com

Alex Young K. Oh
+1-202-223-7334
aoh@paulweiss.com

Lorin L. Reisner
+1-212-373-3250
lreisner@paulweiss.com

Jeannie S. Rhee
+1-202-223-7466
jrhee@paulweiss.com

Theodore V. Wells Jr.
+1-212-373-3089
twells@paulweiss.com

Kaye N. Yoshino
+81-3-3597-8101
kyoshino@paulweiss.com

Farrah R. Berse
+1-212-373-3008
fberse@paulweiss.com

Peter Jaffe
+1-202-223-7326
pjaffe@paulweiss.com

Justin D. Lerer
+1-212-373-3766
jlerer@paulweiss.com

Associates Matthew Driscoll, Juan J. Gascon, Elyssa E. Abuhoff and Nicholas A. Butto contributed to this Client Memorandum.