WILMERHALE

Global Anti-Bribery Year-in-Review: 2020 Developments and Predictions for 2021

January 28, 2021

2020 ENFORCEMENT TRENDS AND KEY DEVELOPMENTS

A. Introduction

As was true in many areas of the law, Foreign Corrupt Practices Act (FCPA) enforcement in 2020—and anti-corruption enforcement more generally—was affected by the COVID-19 pandemic, but perhaps not as much as was initially expected. Although the number of Department of Justice (DOJ) and Securities and Exchange Commission (SEC) enforcement actions was down in 2020 compared to recent years, the DOJ and SEC both remained active in enforcing the FCPA, bringing major cases that set new records and issuing new updates to longstanding FCPA guidance. Below are four key developments from 2020:

1. ***Two New Cases Top the Penalty Charts***: The year started with the Airbus case, which set a new record at the time for FCPA penalties. The resolution involved coordination by the United States with French and UK authorities, and resulted in $2.1 billion in penalties.[1] In October 2020, however, the Airbus settlement was eclipsed by another record settlement, this time with The Goldman Sachs Group, Inc., which agreed to $3.3 billion in penalties imposed by the DOJ and SEC, becoming the largest combined FCPA penalty on record. This case also involved cooperation by US authorities with a number of foreign law enforcement agencies.[2]
2. ***Record-Breaking Year in Overall Penalties***: As a result of these two resolutions, the year 2020 became a record-breaking one for penalties, even with a decrease in the number of

[1] In total, Airbus agreed to pay $3.9 billion in global penalties to resolve charges relating to the foreign bribery case, as well as charges brought by the US authorities for violations of the International Traffic in Arms Regulations (ITAR). US Department of Justice Press Release No. 20-114: Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020).
[2] In July 2020, Goldman Sachs also settled charges with Malaysian prosecutors related to the conduct for $2.5 billion. The Goldman Sachs Group, Inc., Current Report (Form 8-K) (July 24, 2020), https://sec.report/Document/0001193125-20-198162/. In total, Goldman Sachs agreed to pay $5.1 billion to settle governmental and regulatory settlements relating to the conduct. The Goldman Sachs Group, Inc., Current Report (Form 8-K) (Oct. 22, 2020), https://www.goldmansachs.com/investor-relations/financials/current/8k/8k-10-22-20.pdf.

enforcement actions, suggesting that US authorities continue to focus on major investigations with large penalties.

3. ***Updated Enforcement Guidance***: The DOJ and SEC also continued to provide guidance to the public on compliance with the FCPA. Specifically, US authorities updated the DOJ's and SEC's FCPA Resource Guide (Resource Guide) and the DOJ's Evaluation of Corporate Compliance Programs Guidance (Compliance Guidance).

4. ***Key Legal Rulings***: In 2020, courts issued two important FCPA-related legal decisions. *First*, in June 2020, the US Supreme Court held in *Liu v. SEC* that the disgorgement remedy must be directly tied to ill-gotten gains, as it is supposed to benefit victims. It remains to be seen how this ruling will be applied in FCPA cases. Congress also acted in connection with SEC disgorgement power—passing legislation to expand the SEC's ability to collect disgorgement for conduct within the past ten years, overruling in some respects the Supreme Court's 2017 decision in *Kokesh v. SEC*. *Second*, in December 2020, the US Court of Appeals for the Second Circuit affirmed the district court opinion in *United States v. Ho,* holding, among other things, that: (i) an individual can be charged under both the 78dd-2 and 78dd-3 provisions of the FCPA, i.e., that these provisions are not necessarily mutually exclusive; (ii) a violation of 78dd-3 can be specified unlawful activity in connection with a money laundering charge; and (iii) that money transferred into and out of a correspondent account in the United States was sufficient to confer jurisdiction under the relevant money laundering statute even where "the United States is neither the point of origination nor the end destination for the money, but is instead just an intermediate stop along the way."[3] As discussed below, this expansive holding creates the possibility of an increase in the US authorities' use of the money laundering statutes in lieu of or alongside FCPA charges.

The end of the Trump Administration also provides an occasion to look back on FCPA enforcement over the past four years. Despite predictions that the Administration would radically scale back anti-bribery enforcement, particularly in light of negative comments Donald Trump made about the FCPA before he was elected president,[4] the Trump Administration's approach to FCPA enforcement was largely business as usual, continuing prior trends of high levels of enforcement activity and large corporate penalties. The lesson is that, as has been true over the past several administrations, anti-corruption law enforcement in the United States is a mostly non-partisan affair. And, perhaps just as importantly, that enforcement is no longer just a US affair, given the continued momentum in international anti-corruption law enforcement.

B. 2020 Enforcement Trends and Priorities

1. Level of Enforcement Activity in 2020

The quantity of FCPA enforcement actions decreased during 2020, likely due at least in part to the COVID-19 pandemic and the attendant logistical difficulties posed in overseas investigations.

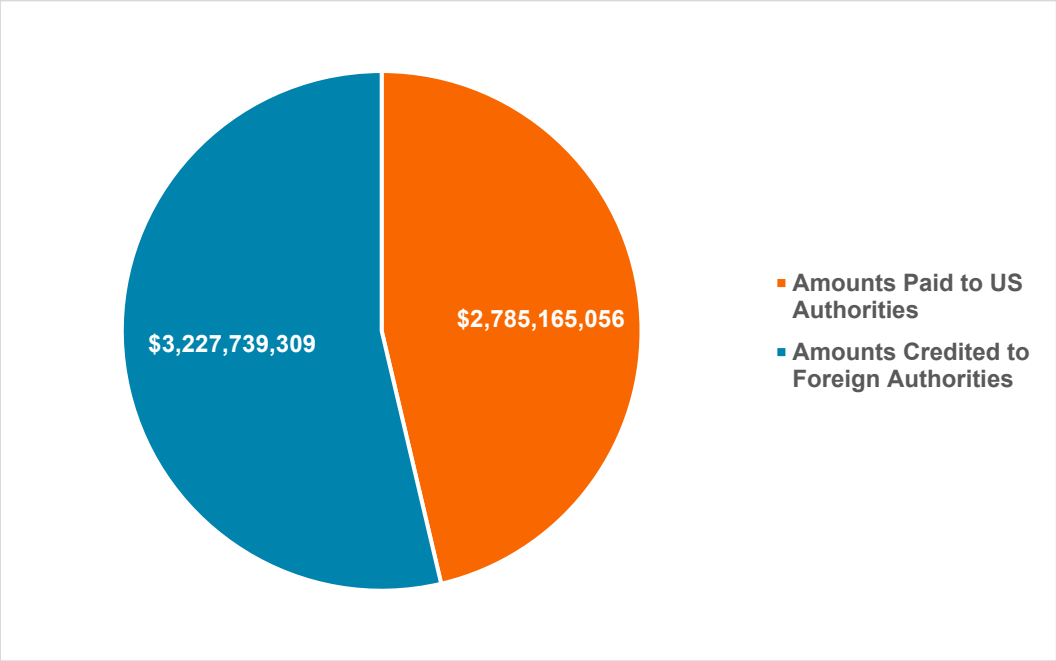
[3] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *8 (2d. Cir. Dec. 29, 2020).
[4] Jeanna Smialek, "*Trump Tried to Kill Anti-Bribery Rule He Deemed 'Unfair,' New Book Alleges*," NEW YORK TIMES (Jan. 15, 2020), https://www.nytimes.com/2020/01/15/business/economy/trump-bribery-law.html.

Despite this, 2020 was far and away the biggest year on record for FCPA financial penalties, with total penalties more than double those of 2019, which was itself a record high. While monetary penalties imposed by US authorities on corporations for FCPA-related conduct[5] totaled $2.9 billion in 2019, corporate monetary penalties in 2020 totaled $6.4 billion. And this does not include the billions of dollars that companies agreed to pay to foreign authorities for violations of those countries' anti-bribery laws, penalties to the US Department of State for violations of the International Traffic in Arms Regulation (ITAR), or penalties imposed by the Commodity Futures Trading Commission (CFTC) for bribery-related conduct.[6] That said, because several of the largest settlements in 2020 involved large credits for payments to foreign regulators, the 2020 settlements resulted in US authorities actually collecting approximately $2.8 billion for FCPA financial penalties—less than half of the total penalties imposed. In addition to being significantly lower than the total $6.4 billion in penalties, this figure is only slightly higher than the $2.65 billion in penalties collected by US authorities in 2019 in connection with FCPA resolutions.

[5] To calculate total monetary penalties imposed in FCPA-related actions against companies, we counted the amounts set out in resolution papers that a settling party could be liable to pay to US enforcement agencies, even if those penalties were ultimately offset by payments to other entities (e.g., foreign authorities). We believe that the total penalty number, regardless of offsets, most accurately represents the scope of FCPA liability because US authorities retained the right to collect those amounts. Furthermore, even if in some cases settling parties agreed to larger penalties based on the understanding that there would be an offset, payments made to non-US government agencies can still be traced back to FCPA-related conduct to some degree. In other words, it is unlikely that foreign authorities would have received the same amount without US enforcement activity or the specter of FCPA liability. It is of course impossible to determine how much of a global resolution would have occurred without FCPA enforcement. But because some of those payments are at least partly attributable to FCPA enforcement, we have included them to provide a complete picture of overall FCPA-related liability.

[6] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021, ¶ 8 (D.D.C. Jan. 31, 2020); US Department of Justice Press Release No. 20-114: Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020); WilmerHale, *Airbus to Pay Record $4 Billion to Settle Global Bribery Scheme* (Feb. 5, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200205-airbus-to-pay-record-4-billion-to-settle-global-bribery-scheme; US Department of Justice Press Release No. 20-1310: Vitol Inc. Agrees to Pay over $135 Million to Resolve Foreign Bribery Case (Dec. 3, 2020).

Total FCPA Penalty Amounts Paid[7] to US and Foreign Authorities[8]



Large resolutions against a small number of companies continued to account for most of the FCPA penalties imposed by US authorities, continuing a trend from recent years. Two resolutions—the $3.3 billion Goldman Sachs settlement and the $2.1 billion Airbus settlement—together constituted 84% of the $6.4 billion total penalties noted above. Similarly, in 2019, the combined Telefonaktiebolaget LM Ericsson and Mobile Telesystems PJSC settlements accounted for 66% of corporate monetary penalties for that year, and the $1.8 billion Petróleo Brasileiro S.A. settlement

[7] As noted above in footnote 5, to calculate the total monetary penalties imposed in FCPA-related actions against companies, we counted the amounts set out in resolution papers that a settling party could be liable to pay to US enforcement agencies, even if those penalties were ultimately offset by payments to other entities (e.g., foreign authorities). For purposes of this graph, we necessarily take into account these offsets in calculating the total amount of FCPA-related penalties that were ultimately paid to both US and foreign authorities. In doing so, however, we only include payments to foreign regulators specifically credited in the DOJ or SEC papers, and do *not* count payments made pursuant to separate resolutions entered into by companies with foreign regulators that are not factored into the DOJ and SEC numbers. Finally, because DOJ enforcement actions can provide credit for payments made to resolve SEC enforcement actions (and vice versa), the sum of the payments depicted in this pie chart (approximately $6 billion) is lower than the $6.4 billion in total FCPA penalties that we reference elsewhere in this article.

[8] Deferred Prosecution Agreement, *United States v. Vitol Inc.*, No. 20-CR-00539 (E.D.N.Y. Dec. 3, 2020); Deferred Prosecution Agreement, *United States v. Beam Suntory Inc.*, No. 20-CR-00745 (N.D. Ill. Oct. 23, 2020); Deferred Prosecution Agreement, *United States v. Goldman Sachs*, No. 20-CR-00437 (E.D.N.Y. Oct. 22, 2020); Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-CR-00365 (E.D.N.Y. Oct. 14, 2020); Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-00363 (E.D.N.Y. Sept. 22, 2020); Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443 (S.D.N.Y. Aug. 24, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of World Acceptance Corp.*, Rel. No. 89489, File No. 3-19905 (Aug. 6, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852 (July 2, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Release No. 88679, File No. 3-19751 (Apr. 17, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cardinal Health, Inc.*, Rel. No. 88303, File No. 3-19718 (Feb. 28, 2020); Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021 (D.D.C. Jan. 31, 2020).

comprised 62% of total monetary penalties for 2018.[9] Domestic companies accounted for 57% of FCPA resolutions in 2020, a sharp increase from prior years. As a comparison, in 2019, US-based companies were the subject of only 38% of FCPA resolutions against corporate defendants.

Despite the rise in total corporate monetary penalties, the total number of enforcement actions[10] declined from 65 in 2019 to 40. The total number of corporate enforcement actions[11] dropped from 20 in 2019 to 16 in 2020, while individual actions[12] dropped from 45 in 2019[13] to 24 in 2020. As discussed below in more detail,[14] six of the 21 individuals prosecuted by the DOJ in 2020 were charged for their alleged involvement in corruption at either Petroleos de Venezuela, S.A. (PDVSA) or Empresa Publica de Hidrocarburos del Ecuador (PetroEcuador). The remaining individuals were prosecuted for their alleged involvement in other FCPA matters.

[9] *See* WilmerHale, *Foreign Corrupt Practices Act Alert: Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 5 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.

[10] We recognize that other commentators may present slightly different numbers depending on their methodology. For a description of our methodology for counting corporate and individual enforcement actions, please refer to footnotes 11 and 12 below.

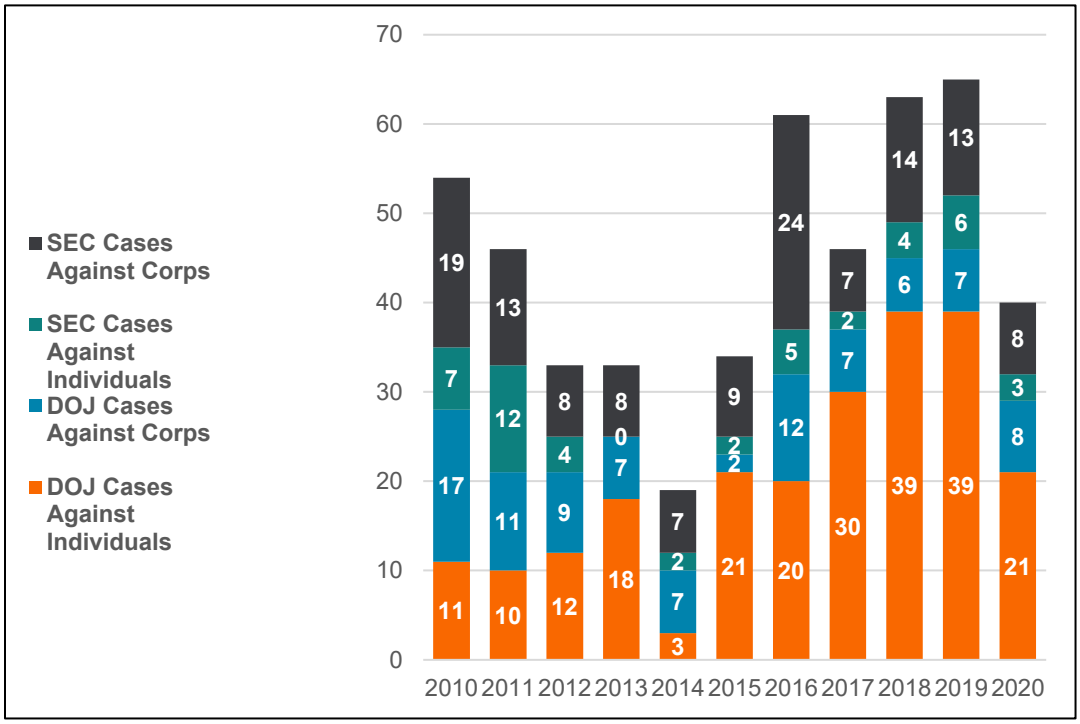
[11] To determine the number of corporate enforcement actions for the year, we counted enforcement actions brought by the SEC and DOJ separately (e.g., parallel settlements with the same entity by the SEC and DOJ count as two actions). However, actions brought by a single agency against related corporate entities (e.g., a parent and subsidiary) for the same core conduct count as only one action. Declinations and case closures are not included within this metric.

[12] To determine the number of individual enforcement actions for the year, we counted charges against individuals in the year they were filed, *not* the year they were announced (i.e., criminal charges unsealed at a later date are included in the count for the year they were originally filed). In addition to charges alleging violations of the substantive FCPA provisions, we also included non-FCPA charges for which the allegations relate to bribery schemes. These non-FCPA charges included, but are not limited to, conspiracy to violate the FCPA, money laundering, and conspiracy to commit money laundering.

[13] Though our 2019 Global Anti-Bribery Year-in-Review noted that the DOJ charged 26 individuals, this number has been updated to account for criminal charges against individuals that were brought in 2019 but unsealed in 2020.

[14] *See infra* at pp. 49-63.

DOJ and SEC Enforcement Actions 2010-2020[15]



In 2020, two corporations—Eni and a European pharmaceutical company—were charged with FCPA violations for a second time, making the total number of repeat corporate FCPA offenders now 16 companies, seven of which have been charged for the second time since 2017. The European pharmaceutical company previously settled with the SEC in 2016, on a neither-admit-nor-deny basis, in relation to books and records and internal accounting controls violations, and Eni similarly reached a settlement with the SEC in 2010 for violating the same provisions.[16]

2. COVID-19's Impact on Government Enforcement

Like nearly all activities across the United States and around the world, FCPA enforcement by the US government appears to have slowed somewhat during the pandemic, particularly during the first few months of the crisis. Indeed, between March and December 2020, US authorities resolved only 16 FCPA investigations of companies. Nevertheless, even in the relatively early stages of the pandemic and attendant lockdowns, Charles Cain, the chief of the SEC Enforcement Division's FCPA Unit, insisted that his unit was "not hitting the pause button on [its] investigations."[17] As the pandemic has worn on, enforcement staff appear to have adapted, using methods such as video conferencing to continue investigations even while working remotely. Indeed, Albert Stieglitz, a

[15] For a description of our methodology for counting corporate and individual enforcement actions, please refer to footnotes 11 and 12 above.
[16] US Securities and Exchange Commission Litigation Release No. 21588: SEC Charges Snamprogetti Netherlands, B.V. with Foreign Bribery and Related Accounting Violations and ENI, S.p.A. with Books and Records and Internal Controls Violations (July 7, 2010).
[17] Clara Hudson, *"We're not hitting the pause button," says SEC foreign bribery chief*, GLOBAL INVESTIGATIONS REVIEW (May 19, 2020), https://globalinvestigationsreview.com/just-anti-corruption/were-not-hitting-the-pause-button-says-sec-foreign-bribery-chief.

federal prosecutor from the Fraud Section of the DOJ's Criminal Division, has praised the Fraud Section as being "extraordinarily successful" at handling complex cases in light of the COVID-19 pandemic.[18]

The adjustment of enforcement authorities to the logistical challenges of conducting investigations during a global pandemic does not, of course, mean that the challenges of working during this unprecedented time are insignificant. For example, the DOJ has reportedly experienced difficulties in ensuring the efficient and timely sharing of evidence with international partners. In May 2020, the DOJ's then-Assistant Attorney General (AAG) of the Criminal Division, Brian A. Benczkowski, acknowledged that mutual legal assistance treaty (MLAT) requests had become more difficult to process due to the COVID-19 pandemic, particularly "incoming requests that need to go to third-party providers" that are feeling the pandemic's effects.[19] The COVID-19 pandemic has also dramatically curtailed travel and thus affected the DOJ's and SEC's ability to conduct face-to-face witness interviews. This, in turn, has resulted in some defense counsel seeking to postpone their client's testimony so they can be physically present in the room with their client.[20]

3. COVID-19's Impact on Corporate Compliance

The impact of the COVID-19 pandemic is also keenly being felt by corporations and private organizations across the globe. The economic fallout has been widespread; an October 2020 projection by the International Monetary Fund (IMF) estimates a 4.4% decrease in world gross domestic product (GDP) for the year.[21] Within the United States, the IMF forecasts a similar decrease in GDP (-4.3%).[22] According to figures from the US Bureau of Economic Analysis, GDP decreased at an annual rate of 5% during the first quarter of the year[23] and 31.4% during the second quarter, before rebounding sharply (an estimated 33.4%) in the third quarter.[24]

In light of this dramatic economic slowdown, many companies have fewer resources to dedicate to compliance programs. In a July 2020 compliance webinar, Daniel Kahn, then a senior deputy chief

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[18] Ines Kagubare, *Fraud Section overcoming pandemic challenges, says DOJ official*, GLOBAL INVESTIGATIONS REVIEW (Oct. 8, 2020), https://globalinvestigationsreview.com/just-anti-corruption/fraud-section-overcoming-pandemic-challenges-says-doj-official.
[19] Clara Hudson, *International evidence sharing has slowed, Benczkowski says*, GLOBAL INVESTIGATIONS REVIEW (June 18, 2020), https://globalinvestigationsreview.com/just-anti-corruption/international-evidence-sharing-has-slowed-benczkowski-says.
[20] Clara Hudson, *"We're not hitting the pause button," says SEC foreign bribery chief*, GLOBAL INVESTIGATIONS REVIEW (May 19, 2020), https://globalinvestigationsreview.com/just-anti-corruption/were-not-hitting-the-pause-button-says-sec-foreign-bribery-chief.
[21] International Monetary Fund, World Economic Outlook: A Long and Difficult Ascent, at 55 (Oct. 2020), https://www.imf.org/en/Publications/WEO/Issues/2020/09/30/world-economic-outlook-october-2020#Full%20Report%20and%20Executive%20Summary.
[22] International Monetary Fund, World Economic Outlook: A Long and Difficult Ascent, at 57 (Oct. 2020), https://www.imf.org/en/Publications/WEO/Issues/2020/09/30/world-economic-outlook-october-2020#Full%20Report%20and%20Executive%20Summary.
[23] United States Bureau of Economic Analysis Press Release 20-29: Gross Domestic Product, 1st Quarter 2020 (Third Estimate); Corporate Profits, 1st Quarter 2020 (Revised Estimate) (June 25, 2020), https://www.bea.gov/news/2020/gross-domestic-product-1st-quarter-2020-third-estimate-corporate-profits-1st-quarter-2020.
[24] United States Bureau of Economic Analysis Press Release 20-67: Gross Domestic Product (Third Estimate), Corporate Profits (Revised), and GDP by Industry, Third Quarter 2020 (Dec. 22, 2020), https://www.bea.gov/news/2020/gross-domestic-product-third-estimate-corporate-profits-revised-and-gdp-industry-third.

in the DOJ's Fraud Section and now the acting chief of the Fraud Section,[25] acknowledged that while companies may need to make cuts to compliance programs given the challenging economic environment, they should be careful to allocate remaining resources in order to ensure that their programs continue to be tailored to their risks.[26] Mr. Kahn encouraged companies to implement any necessary cuts to compliance programs in such a way as to ensure that their programs would remain capable of addressing the risks these companies continue to face.[27] Mr. Kahn advised companies to be mindful that a reduction in resources across business units does not necessarily equate to a corresponding decline in compliance risks.[28] Instead, the economic challenges companies may be experiencing during the pandemic might increase certain compliance risks, as the need to win business becomes more urgent. Similarly, Charles Cain, the chief of the SEC Enforcement Division's FCPA Unit, noted during the ACI 37th Annual Conference on the FCPA that it is important that companies should not become complacent in pursuing their compliance program goals in light of the pandemic.[29] Based on these public statements, companies should be assessing whether modifications need to be made to allow their compliance programs to function appropriately despite limitations resulting from the inability to work in person or travel. Compliance breakdowns due to the pandemic are unlikely to be seen by enforcement authorities as a legitimate excuse for inaction.

The COVID-19 pandemic has rapidly precipitated a dramatic shift to remote work at many companies around the world. In the face of broad-based "work from home" policies at many organizations, companies' abilities to conduct in-person training and visits by compliance personnel have been severely limited.[30] In a time in which an organization's personnel are not all physically present in the organization's offices and employee travel may be dramatically curtailed, compliance personnel may experience additional hurdles in training, monitoring, and investigating employee conduct. The impact of the pandemic on compliance may not, however, be universally negative. Indeed, with travel and in-person interactions reduced by the pandemic, companies are likely dealing with fewer compliance-sensitive gifts, entertainment, meals, or travel expenses, at least in the short term.[31]

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[25] Dylan Tokar, *Justice Department Gets New Acting Fraud Section Chief*, WALL ST. J. (Sept. 3, 2020), https://www.wsj.com/articles/justice-department-gets-new-acting-fraud-section-chief-11599169540.
[26] Maggie Hicks, *DOJ official discusses how to address compliance budget challenges*, GLOBAL INVESTIGATIONS REVIEW (July 28, 2020), https://globalinvestigationsreview.com/just-anti-corruption/doj-official-discusses-how-address-compliance-budget-challenges.
[27] Maggie Hicks, *DOJ official discusses how to address compliance budget challenges*, GLOBAL INVESTIGATIONS REVIEW (July 28, 2020), https://globalinvestigationsreview.com/just-anti-corruption/doj-official-discusses-how-address-compliance-budget-challenges.
[28] Maggie Hicks, *DOJ official discusses how to address compliance budget challenges*, GLOBAL INVESTIGATIONS REVIEW (July 28, 2020), https://globalinvestigationsreview.com/just-anti-corruption/doj-official-discusses-how-address-compliance-budget-challenges.
[29] Charles Cain, Chief, FCPA Unit, SEC, Remarks at the American Conference Institute's 37th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2020).
[30] WilmerHale, *COVID-19: Investigations in the Time of Coronavirus: Conducting FCPA Investigations in Latin America During the Pandemic* (Aug. 11, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200811-investigations-in-the-time-of-coronavirus-conducting-fcpa-investigations-during-the-pandemic.
[31] Although government authorities have not provided guidance on the types of virtual gatherings and events that have become the norm during the pandemic, in July 2020 the Financial Industry Regulatory Authority (FINRA) promulgated guidance to address whether it is consistent with FINRA rules for an "associated person to host a virtual business entertainment event or a video meeting with the employees of an institutional

The COVID-19 pandemic, of course, has affected companies in a variety of other ways beyond the shift to virtual events and meetings. Companies are grappling with changes to due diligence and their normal screening processes, as well as their ability to conduct auditing and monitoring in this "new normal." Furthermore, companies considering charitable donations related to COVID-19 efforts, or companies seeking to obtain necessary personal protective equipment to reopen, must ensure they are avoiding corruption risks.

Several international organizations issued guidance on avoiding COVID-19-related corruption risks. For example, in April 2020, the Council of Europe's Group of States against Corruption (GRECO) published guidelines aimed at preventing corruption in the face of the particular risks brought on by the COVID-19 pandemic.[32] In these guidelines, GRECO focuses on various "typologies" of corruption within the healthcare sector in the context of the COVID-19 pandemic.[33] These GRECO guidelines highlight the potential for: (1) corruption in "procurement systems" within the healthcare sector, which have been impacted by government legislation in response to the COVID-19 pandemic and which can "become vulnerable targets for lobbyists"; (2) bribery in relation to "medical-related services," which can be susceptible to corruption risks due to stressors from the COVID-19 pandemic; (3) "corruption in new product research and development," including the risks of "conflicts of interests"; and (4) "COVID-19-related fraud," such as fraud related to "falsified medical products" or personal protective equipment.[34] GRECO also emphasized in its guidelines the important of whistleblowers, noting that they "can be key in the fight against corruption and tackling gross mismanagement in the public and private sectors, including the health sector," and recommending that member states ensure the protection of whistleblowers "irrespective of the reporting lines they choose to pursue."[35]

In April 2020, the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery issued a statement warning that "[b]ribery and corruption have the potential to

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customer or third-party broker-dealer" and to provide food and beverages designed to be consumed during this event. *See* FINRA, Gifts/Business Entertainment/Non-Cash Compensation FAQs, https://www.finra.org/rules-guidance/guidance/faqs/business-entertainment. FINRA Rule 3220 generally prohibits "any member or person associated with a member, directly or indirectly, from giving anything of value in excess of $100 per year to any person where such payment is in relation to the business of the recipient's employer." *Id.* However, Rule 3220, and associated non-cash compensation rules, have been interpreted to permit "business entertainment of a member's clients and their guests." *Id.* FINRA has thus clarified that "where a member firm's associated persons personally host an interactive virtual business entertainment event or meeting," the "provision of reasonable amounts of food and beverage designed to be consumed by the recipient employees and their guests during that virtual business entertainment" would not be subject to Rule 3220's $100 gift limit, so long as "the frequency with which it is provided do not raise questions of propriety" and this food/beverage is not preconditioned on achieving a sales target. *Id.*

[32] Council of Europe Group of States against Corruption, COVID-19 pandemic: GRECO warns of corruption risks (Apr. 21, 2020), https://www.coe.int/en/web/portal/-/covid-19-pandemic-greco-warns-of-corruption-risks.

[33] Council of Europe Group of States against Corruption, Corruption Risks and Useful Legal References in the Context of COVID-19, at 2 (Apr. 15, 2020), https://rm.coe.int/corruption-risks-and-useful-legal-references-in-the-context-of-covid-1/16809e33e1.

[34] Council of Europe Group of States against Corruption, Corruption Risks and Useful Legal References in the Context of COVID-19, at 2-4 (Apr. 15, 2020), https://rm.coe.int/corruption-risks-and-useful-legal-references-in-the-context-of-covid-1/16809e33e1.

[35] Council of Europe Group of States against Corruption, Corruption Risks and Useful Legal References in the Context of COVID-19 at 5 (Apr. 15, 2020), https://rm.coe.int/corruption-risks-and-useful-legal-references-in-the-context-of-covid-1/16809e33e1.

undermine the global response to tackle the [COVID-19] crisis."[36] Bribery and corruption could, for instance, "divert essential resources—such as vital equipment and medicines—away from their intended purpose" or result in "ineffective, or unequal access to medicines and medical equipment."[37] The Chair of the OECD Working Group on Bribery encouraged parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention) to "work together to ensure their efforts to overcome this crisis are not weakened by corruption."[38] In May 2020, the OECD formulated policy measures to assist parties to ensure their responses to the pandemic are not weakened.[39] These measures consist of respecting "international anti-corruption standards and anti-bribery obligations" in the response to, as well as recovery from, the pandemic crisis; assessing and mitigating corruption risks in emergency procurement; and adopting a risk-based approach to business ethics and compliance, in particular in relation to the use of business intermediaries.[40]

Similarly, in May 2020, the International Monetary Fund (IMF) provided guidance to governmental authorities on budget execution controls in the wake of the COVID-19 pandemic.[41] Drawing on lessons learned from the Ebola crisis in 2014 to 2016, the IMF has detailed a variety of steps that should be undertaken by governments to "mitigate misuse in spending and corruption vulnerabilities" in several different key areas, including: (1) steps focused on protecting procurement systems from corruption; (2) ensuring the prevention of "unauthorized spending" through "expenditure controls"; (3) "[e]stablishing centralized control of the medical goods supply chain" and ensuring inventory management (through, for example, tracking systems designed to monitor "aid-in-kind" support such as food or commodity donations); and (4) undertaking internal and external audits in an effort to verify transactions related to the pandemic.[42]

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[36] OECD Working Group on Bribery, *The global response to the coronavirus pandemic must not be undermined by bribery* (Apr. 22, 2020), https://www.oecd.org/corruption/the-global-response-to-the-coronavirus-pandemic-must-not-be-undermined-by-bribery.htm. *See also OECD Anti-bribery chair: countries must act together to avert pandemic-linked corruption*, GLOBAL INVESTIGATION REVIEW (Oct. 27, 2020), https://globalinvestigationsreview.com/oecd-anti-bribery-chair-countries-must-act-together-avert-pandemic-linked-corruption.

[37] OECD Working Group on Bribery, *The global response to the coronavirus pandemic must not be undermined by bribery* (Apr. 22, 2020), https://www.oecd.org/corruption/the-global-response-to-the-coronavirus-pandemic-must-not-be-undermined-by-bribery.htm.

[38] OECD Working Group on Bribery, *The global response to the coronavirus pandemic must not be undermined by bribery* (Apr. 22, 2020), https://www.oecd.org/corruption/the-global-response-to-the-coronavirus-pandemic-must-not-be-undermined-by-bribery.htm.

[39] OECD, OECD Policy Responses to Coronavirus (COVID-19) (May 26, 2020), https://www.oecd.org/coronavirus/policy-responses/policy-measures-to-avoid-corruption-and-bribery-in-the-covid-19-response-and-recovery-225abff3/.

[40] OECD, OECD Policy Responses to Coronavirus (COVID-19) (May 26, 2020), https://www.oecd.org/coronavirus/policy-responses/policy-measures-to-avoid-corruption-and-bribery-in-the-covid-19-response-and-recovery-225abff3/.

[41] Kubai Khasiani, Yugo Koshima, Abdoulahi Mfombouot, and Ashni Singh, *Budget Execution Controls to Mitigate Corruption Risk in Pandemic Spending*, INTERNATIONAL MONETARY FUND, at 1 (May 19,2020), https://www.imf.org/~/media/Files/Publications/covid19-special-notes/enspecial-series-on-covid19budget-execution-controls-to-mitigate-corruption-risk-in-pandemic-spendin.ashx.

[42] Kubai Khasiani, Yugo Koshima, Abdoulahi Mfombouot, and Ashni Singh, *Budget Execution Controls to Mitigate Corruption Risk in Pandemic Spending*, INTERNATIONAL MONETARY FUND, at 4-7 (May 19, 2020), https://www.imf.org/~/media/Files/Publications/covid19-special-notes/enspecial-series-on-covid19budget-execution-controls-to-mitigate-corruption-risk-in-pandemic-spendin.ashx.

4. Updates to DOJ and SEC Guidance

As has been the case in recent years, in 2020 the DOJ and SEC were active in updating guidance relevant to FCPA compliance. In June 2020, the DOJ announced changes to its Compliance Guidance, the third such iteration of a document that was first released in March 2017 and subsequently updated in April 2019.[43] The Compliance Guidance provides prosecutors with a framework for evaluating corporate compliance programs when "conducting an investigation, determining whether to bring charges, and negotiating plea or other settlement agreements."[44] Though the 2020 updates are less expansive than changes previously made in 2019, they provide valuable insight into factors the DOJ will consider when evaluating an entity's compliance program.[45] These changes are discussed below in further detail.[46]

In July 2020, the DOJ and SEC released the second edition of the Resource Guide to the US Foreign Corrupt Practices Act, the first substantive update to the Resource Guide since its original release in November 2012.[47] Though the second edition of the Resource Guide does not reflect major changes, it does incorporate new case examples, significant policies released by the DOJ since the first edition was published, and recently decided court decisions.[48] These changes are discussed below in further detail.[49]

5. Two New Record-Breaking FCPA Settlements

Notably, enforcement actions brought by US authorities included two record-breaking FCPA settlements, which are discussed below in further detail.[50]

In January 2020, France-based aircraft manufacturer Airbus entered into a deferred prosecution agreement (DPA) with the DOJ and agreed to pay penalties of approximately $2.1 billion in connection with violations of the FCPA, which, when combined with additional penalties to resolve bribery actions in France, the United Kingdom, and export control penalties imposed through both the DPA and a separate consent order with the US Department of State, totaled more than $3.9 billion.[51] The alleged bribery scheme involved the use of third-party business partners to bribe

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[43] WilmerHale, *DOJ Issues Further Guidance on Evaluation of Corporate Compliance Programs* (June 4, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200604-doj-issues-further-guidance-on-evaluation-of-corporate-compliance-programs.
[44] WilmerHale, *DOJ Issues Further Guidance on Evaluation of Corporate Compliance Programs* (June 4, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200604-doj-issues-further-guidance-on-evaluation-of-corporate-compliance-programs.
[45] WilmerHale, *DOJ Issues Further Guidance on Evaluation of Corporate Compliance Programs* (June 4, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200604-doj-issues-further-guidance-on-evaluation-of-corporate-compliance-programs.
[46] *See infra* at pp. 19-22.
[47] WilmerHale, *DOJ and SEC Release Second Edition of the FCPA Resource Guide* (July 14, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200714-doj-and-sec-release-second-edition-of-the-fcpa-resource-guide.
[48] WilmerHale, *DOJ and SEC Release Second Edition of the FCPA Resource Guide* (July 14, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200714-doj-and-sec-release-second-edition-of-the-fcpa-resource-guide.
[49] *See infra* at pp. 22-30.
[50] *See infra* at pp. 35-40.
[51] Note that the DOJ ultimately reduced the fine to be paid to the United States to $294.5 million for the FCPA-related charges after crediting up to $1.8 billion in payments made to French regulators. *See* Deferred

foreign government officials and airline executives.[52] Although the DOJ described the scheme as "massive," the DPA only describes conduct in China—perhaps due to the fact that Airbus was neither an issuer nor a domestic concern, leaving territorial jurisdiction as the only basis for which the US authorities could pursue FCPA charges.

Nine months later, this record was broken. In October 2020, New York financial institution Goldman Sachs entered into a DPA with the DOJ and a civil settlement with the SEC, agreeing to penalties of more than $3.3 billion[53] to resolve bribery charges in the United States. Due to credits against settlements with the SEC, other domestic regulators, and several foreign authorities, the company ultimately was required to pay $1.67 billion to the US authorities. When including related settlements with authorities in Singapore, the United Kingdom, and Hong Kong, Goldman Sachs ultimately paid approximately $2.6 billion in penalties pursuant to these coordinated resolutions—in addition to the $2.5 billion in penalties that Goldman Sachs agreed to pay Malaysia to resolve charges related to this conduct, for a total of $5.1 billion paid worldwide.[54] All of these enforcement actions related to what the government alleged to have been a five-year-long scheme largely involving theft and embezzlement by former bank employees and others, in which US authorities alleged that the scheme also involved the payment of bribes to high-ranking government officials in Malaysia and Abu Dhabi to secure business opportunities, including the underwriting of three bond deals for 1Malaysia Development Bhd. (1MDB).[55]

6. Continued Use of Accounting Provisions Charges to Resolve Matters

In 2020, the SEC (and, to a much lesser extent, the DOJ) continued a time-tested approach of bringing accounting provisions charges on their own without accompanying bribery charges. Indeed, six of the eight enforcement actions the SEC brought against corporations in 2020 involved charges brought under the FCPA's accounting provisions without any corresponding anti-bribery charges (compared to only one of the DOJ's eight enforcement actions).[56] That said, unlike in past years when the SEC has brought cases based only on the accounting provisions *without* any direct

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Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021, ¶¶ 8-9 (D.D.C. Jan. 31, 2020); US Department of Justice Press Release No. 20-114: Airbus Agrees to Pay Over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020); WilmerHale, *Airbus to Pay Record $4 Billion to Settle Global Bribery Scheme* (Feb. 5, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200205-airbus-to-pay-record-4-billion-to-settle-global-bribery-scheme.

[52] US Department of Justice Press Release No. 20-114: Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020).

[53] In calculating this figure, we only counted once the approximately $606 million in disgorgement that both the DOJ and SEC imposed as part of their resolutions, which in both cases was credited against payments to other authorities.

[54] The Goldman Sachs Group, Inc., Current Report (Form 8-K) (Oct. 22, 2020), https://www.goldmansachs.com/investor-relations/financials/current/8k/8k-10-22-20.pdf; The Goldman Sachs Group, Inc., Current Report (Form 8-K) (July 24, 2020), https://sec.report/Document/0001193125-20-198162/.

[55] US Department of Justice Press Release No. 20-1143: Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion (Oct. 22, 2020).

[56] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cardinal Health, Inc.*, Rel. No. 88303, File No. 3-19718 (Feb. 28, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751 (Apr. 17, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852 (July 2, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Herbalife Nutrition Ltd.*, Rel. No. 89704, File No. 3-19948 (Aug. 28, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of J&F Investimentos S.A.*, Rel. No. 90170, File No. 3-20124 (Oct. 14, 2020).

evidence of bribery described in the settlement papers, all six of these enforcement actions brought by the SEC in 2020 did include factual allegations of bribery. Although it can be difficult to ascertain the factors driving decisions by the DOJ and SEC to bring only accounting provisions charges when bribery-related allegations are also made in the settlement papers, possible reasons include jurisdictional issues (e.g., lack of interstate commerce), lack of evidence of scienter, or an inability to establish agency over the relevant subsidiary whose employees committed the misconduct.[57]

Although bringing charges under these internal controls and books and records provisions without accompanying bribery charges has become commonplace, two SEC commissioners in 2020 objected to the practice, albeit in a non-FCPA case. In an October 2020 enforcement action against Andeavor LLC, the SEC alleged that Andeavor violated the internal accounting controls provision when the company repurchased its stock from shareholders following a determination by its legal department that the company's CEO—who directed the share repurchase—did not possess material nonpublic information about a merger.[58] Of note, the SEC did not bring charges under Rule 10b-5, the regulation typically used by the SEC for insider trading cases, but instead brought charges under the FCPA's internal accounting controls provision, 15 U.S.C. § 78m(b)(2)(B).[59] In a dissent issued in November 2020, two SEC commissioners—Hester M. Pierce and Elad L. Roisman—expressed their view that the SEC had applied the internal accounting controls provision of the FCPA too broadly, noting that "[s]ince Section 13(b)(2)(B)'s enactment in 1977, the Commission has never before found that the 'internal accounting controls' required by that provision include management's assessment of a company's potential insider trading liability."[60] The dissent echoes critiques that the SEC has previously received for purportedly overstepping the intended scope of the FCPA's internal accounting controls provision, in attempts to target business practices that the Commission deems unethical.[61] Although the dissent could potentially portend a slightly narrower approach by the SEC in wielding the internal accounting controls provision, whether the FCPA Unit at the SEC alters its view on how broadly these provisions should be

[57] *See Clara Hudson, "They're Just Scaring People": SEC Chief Responds to Defence Bar's Criticisms,* GLOBAL INVESTIGATIONS REVIEW Sept. 25, 2019, https://globalinvestigationsreview.com/article/jac/1198076/%E2%80%9Cthey%E2%80%99re-just-scaring-people%E2%80%9D-sec-chief-responds-to-defence-bar%E2%80%99s-criticisms (noting comments made by Charles Cain, head of the SEC's FCPA's unit, at a white-collar crime conference in September of 2019, stating in part that "[t]he idea that we bring accounting cases when we can't prove a bribe is just simply not the case . . . . It's often just because of the fact that maybe interstate commerce wasn't used in connection with the bribe scheme; maybe we're not able to establish agency over the subsidiary where the conduct took place so you can't charge the substantive charge itself.").
[58] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Andeavor LLC*, Rel. No. 90208, File No. 3-20125 (Oct. 15, 2020).
[59] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Andeavor LLC*, Rel. No. 90208, File No. 3-20125 (Oct. 15, 2020); US Securities and Exchange Commission Public Statement: Statement of Commissioners Hester M. Peirce and Elad L. Roisman - Andeavor LLC (Nov. 13, 2020), https://www.sec.gov/news/public-statement/peirce-roisman-andeavor-2020-11-13.
[60] US Securities and Exchange Commission Public Statement: Statement of Commissioners Hester M. Peirce and Elad L. Roisman - Andeavor LLC (Nov. 13, 2020), https://www.sec.gov/news/public-statement/peirce-roisman-andeavor-2020-11-13.
[61] US Securities and Exchange Commission Public Statement: Statement of Commissioners Hester M. Peirce and Elad L. Roisman - Andeavor LLC (Nov. 13, 2020), https://www.sec.gov/news/public-statement/peirce-roisman-andeavor-2020-11-13.

applied based on this dissent, or continues the approach it has taken in recent years, remains to be seen.

7. DOJ's Trial and Appellate Activity

The year 2020 was also a busy year for the DOJ as it litigated FCPA and other corruption-related cases—offering mixed results for the Department.

The DOJ kicked off the year with some trial victories. In January 2020, Donville Inniss, a former member of the Barbados Parliament, was convicted of one count of conspiracy to commit money laundering and two counts of money laundering, relating to bribe payments he received in exchange for providing government contracts with the Insurance Corporation of Barbados Limited (ICBL).[62] The DOJ had alleged that between August 2015 and April 2016, Inniss accepted $36,000 in bribes from ICBL and laundered the money through the United States.[63] After receiving the bribes, Inniss allegedly caused the Barbados Investment and Development Corporation to renew an insurance contract with ICBL.

In February 2020, Judge Theodore Chuang of the US District Court for the District of Maryland denied a motion for acquittal filed by Mark Lambert, a former co-president of the Maryland-based transportation company Transportation Logistics Inc., who in November 2019 was convicted of several charges in connection with bribes paid to a Russian official in exchange for contracts with TENEX, a subsidiary of Russia's State Atomic Energy Corporation, to deliver nuclear materials to customers in the United States and abroad.[64] Specifically, Lambert had requested that the district court acquit him on the two wire fraud counts upon which he was convicted. In rejecting Lambert's argument, the court noted that the DOJ had presented sufficient evidence for the conclusion that Lambert and his co-conspirators were guilty of wire fraud.[65] In addition to the two wire fraud counts, Lambert was also convicted of one count of conspiracy to violate the FCPA and to commit wire fraud, and four counts of violating the FCPA.[66]

The DOJ was also victorious in several significant appellate cases. In May 2020, the US Court of Appeals for the Fifth Circuit denied the appeal of Samir Khoury, a former engineering consultant who was convicted of corruption charges related to his involvement in a kickback scheme aimed at obtaining oil contracts in Oman, Qatar, Egypt, and elsewhere.[67] A few months after the denial, the Fifth Circuit denied Khoury's request for a rehearing en banc.[68] In June 2020, the Supreme Court of the United States declined to hear Macau real estate developer Ng Lap Seng's appeal of his

[62] US Department of Justice Press Release No. 20-52: Former Member of Barbados Parliament and Minister of Industry Found Guilty of Receiving and Laundering Bribes from Barbadian Insurance Company (Jan. 16, 2020).
[63] Second Superseding Indictment, *United States v. Donville Inniss, Ingrid Innes, and Alex Tasker*, No. 18-CR-00134, at 2-3 (E.D.N.Y. Aug. 1, 2019).
[64] Memorandum Order, *United States, v. Mark T. Lambert*, No. 18-CR-00012 (D. Md. Feb. 11, 2020).
[65] Memorandum Order, *United States, v. Mark T. Lambert*, No. 18-CR-00012 (D. Md. Feb. 11, 2020).
[66] Verdict Form, *United States v. Mark Lambert*, No. 18-CR-00012, at 2-3 (D. Md. Nov. 22, 2019).
[67] Denial of Petition for Writ of Mandamus, *United States v. Samir Rafic Khoury*, No. 20-20126 (5th Cir. May 12, 2020).
[68] On Petition for Rehearing En Banc, *United States v. Samir Rafic Khoury*, No. 20-20126 (5th Cir. July 13, 2020).

bribery conviction and four year prison sentence relating to the bribery of two United Nations ambassadors for assistance in building a multibillion-dollar conference center.[69]

Finally, in December 2020, the Second Circuit upheld the conviction of former Hong Kong Home Secretary Chi Ping Patrick Ho, who had been convicted by a jury in December 2018 of FCPA and money laundering charges.[70] Among other things, the Second Circuit rejected Ho's argument that a violation of § 78dd-3 of the FCPA could not serve as the specified unlawful activity underlying his money laundering convictions, a ruling that may well lead to the DOJ bringing more money laundering charges in connection with FCPA cases. The Second Circuit's decision is discussed below in further detail.[71]

Along with these litigation victories, however, the DOJ also suffered some significant setbacks. In February 2020, Judge Janet Arterton of the US District Court for the District of Connecticut granted Lawrence Hoskins' motion for a post-conviction order of acquittal on seven of 11 FCPA and money laundering counts and conditionally granted Hoskins a new trial.[72] In partially granting Hoskins' motion, Judge Arterton held that a rational jury could not have determined beyond a reasonable doubt that Hoskins was an agent of the company subject to the FCPA's purview. [73] Judge Arterton's highly notable decision is discussed below in further detail.[74]

In another widely discussed ruling, in March 2020, Judge Allison Burroughs of the US District Court for the District of Massachusetts granted Joseph Baptiste and Roger Richard Boncy new trials following their convictions in June 2019 for conspiring to bribe Haitian officials.[75] Judge Burroughs found that Baptiste's counsel committed a series of missteps and errors, including failure to review certain documents, which resulted in Mr. Baptiste being deprived of the effective assistance of counsel.[76]

8. Increase in SEC Whistleblower Awards

For its part, the SEC was active in granting whistleblower awards during the year. By June 2020, the SEC whistleblower awards made to date had already doubled the 2019 total. By the end of the year, five of the top ten whistleblower awards of all time had been awarded over the course of 2020. This list includes a $22 million whistleblower award in September 2020;[77] a $27 million

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[69] Reuters Staff, *U.S. Supreme Court Rejects Macau Billionaire's Bribery Appeal*, REUTERS (June 29, 2020), https://www.reuters.com/article/us-usa-court-ng/u-s-supreme-court-rejects-macau-billionaires-bribery-appeal-idUSKBN2401V8.
[70] *United States v. Ho*, No. 19-761, 2020 WL 7702576 (2d Cir. Dec. 29, 2020).
[71] *See infra* at pp. 73-74.
[72] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at *29 (D. Conn. Feb. 26, 2020).
[73] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at *18 (D. Conn. Feb. 26, 2020).
[74] *See infra* at pp. 70-73.
[75] Memorandum and Order on Defendants' Motions for Judgment of Acquittal and For a New Trial, *United States v. Joseph Baptiste and Roger Richard Boncy*, No. 17-CR-10305, at *16 (D. Mass. March 11, 2020).
[76] Memorandum and Order on Defendants' Motions for Judgment of Acquittal and For a New Trial, *United States v. Joseph Baptiste and Roger Richard Boncy*, No. 17-CR-10305, at *10-11 (D. Mass. March 11, 2020).
[77] US Securities and Exchange Commission Press Release No. 2020-239: SEC Awards Almost $30 Million to Two Insider Whistleblowers (Sept. 30, 2020).

whistleblower award in April 2020;[78] a $28 million whistleblower award in November 2020;[79] a $50 million whistleblower award in June 2020;[80] and a $114 million whistleblower award in October 2020.[81] According to the SEC, from 2012 when the program began to November 2020, the SEC has awarded approximately $715 million in whistleblower awards to 110 individuals.[82] Because the SEC does not disclose details about these awards, in order to protect the identity of whistleblowers, it is difficult to determine how many—if any—of these whistleblower awards may relate to FCPA matters.

9. Global Enforcement and Cooperation

Despite the COVID-19 pandemic, US authorities continued their extensive cooperation with foreign law enforcement, especially in Europe, Asia, and South America. As noted above, the two blockbuster FCPA settlements of 2020 both involved simultaneous resolutions with non-US authorities. With these two resolutions, seven of the top ten FCPA resolutions of all time (in terms of FCPA penalties levied by US authorities) involved coordination with law enforcement authorities in other countries.[83]

Other resolutions in 2020 that involved global cooperation included the DOJ's resolutions with Sargeant Marine Inc. which cited cooperation with the Ministerio Publico Federal in Brazil,[84] the DOJ's crediting of up to 50% of J&F Investimentos S.A.'s criminal penalty for payments made to Brazilian authorities as part of an earlier enforcement action,[85] and the DOJ's crediting of up to 33% of Vitol Inc.'s criminal penalty for payments made to Brazilian authorities to resolve a parallel investigation by the Ministerio Publico Federal.[86] This continued global coordination serves as a reminder that companies and counsel would do well to consider preparing early for potential parallel investigations by multiple global enforcement authorities when planning FCPA investigation and remediation efforts.

[78] US Securities and Exchange Commission Press Release No. 2020-89: SEC Awards Over $27 Million to Whistleblower (Apr. 16, 2020).
[79] US Securities and Exchange Commission Press Release No. 2020-275: SEC Awards Over $28 Million to Whistleblower (Nov. 3, 2020).
[80] US Securities and Exchange Commission Press Release No. 2020-126: SEC Awards Record Payout of Nearly $50 Million to Whistleblower (June 4, 2020).
[81] US Securities and Exchange Commission Press Release No. 2020-266: SEC Issues Record $114 Million Whistleblower Award (Oct. 22, 2020).
[82] US Securities and Exchange Commission Press Release No. 2020-275: SEC Awards Over $28 Million to Whistleblower (Nov. 3, 2020).
[83] Note that Odebrecht/Braskem has been excluded from the top ten list because their penalty was later significantly reduced.
[84] US Department of Justice Press Release No. 20-983: 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).
[85] US Department of Justice Press Release No. 20-1092: J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over $256 Million to Resolve Criminal Foreign Bribery Case (Oct. 14, 2020).
[86] US Department of Justice Press Release No. 20-1310: Vitol Inc. Agrees to Pay over $135 Million to Resolve Foreign Bribery Case (Dec. 3, 2020).

10. Increased Focus on Data Analytics

Recent DPAs and plea agreements confirm the DOJ's focus on the use of data analytics within compliance programs as a potential method for deterring future misconduct. In particular, recent DPAs and plea agreements with Herbalife Nutrition Ltd. and Sargeant Marine each contain language providing that the company will integrate data analysis into its compliance program sufficient to allow compliance personnel to engage in "timely and effective monitoring and/or testing of transactions" and "a thoughtful root cause analysis."[87] These DPAs and plea agreements follow the DOJ's 2020 update to its Compliance Guidance, which added references to the importance of data aggregation and analysis, as is discussed below in further detail.[88]

In addition to the DOJ's increased focus on data analytics, the proposed use of quantitative data to guide compliance programs is also receiving attention from non-governmental bodies. Notably, in September 2020, the World Economic Forum released a set of environmental, social, and governmental metrics and disclosures containing certain anti-corruption metrics and disclosures that involve both narrative and quantitative reporting.[89] Specifically, the anti-corruption disclosures focus on the percentage of employees who have received training on the company's anti-corruption policies and procedures and metrics on the total number of incidents related to corruption.[90] Of course, implementing meaningful data analysis within a compliance program may be more difficult for smaller corporations or companies with less sophisticated compliance programs and infrastructure.

11. First FCPA Advisory Opinion in Six Years

In August 2020, the DOJ released its first FCPA Advisory Opinion in six years, albeit for a fairly non-controversial transaction. In this Advisory Opinion, the DOJ considered the conduct of a requestor multinational firm, headquartered in the United States, which purchased "a portfolio of assets from a foreign investment bank's foreign subsidiary" (Country A Office).[91] A majority of the shares of this foreign investment bank were in turn owned by a foreign government.[92] In connection with this purchase, the requestor "sought and received assistance from a different foreign subsidiary of the same investment bank" (Country B Office), which provided "legitimate and commercially valuable

[87] Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443 (S.D.N.Y. Sept. 1, 2020); Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-00363 (E.D.N.Y. Sept. 22, 2020).
[88] *See infra* at p. 21; *see also* WilmerHale, *DOJ Issues Further Guidance on Evaluation of Corporate Compliance Programs* (June 4, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200604-doj-issues-further-guidance-on-evaluation-of-corporate-compliance-programs.
[89] World Economic Forum, Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation (Sept. 22, 2020), http://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf.
[90] World Economic Forum, Measuring Stakeholder Capitalism: Towards Common Metrics and Consistent Reporting of Sustainable Value Creation, at 23 (Sept. 22, 2020), http://www3.weforum.org/docs/WEF_IBC_Measuring_Stakeholder_Capitalism_Report_2020.pdf.
[91] US Department of Justice Foreign Corrupt Practices Act Review Opinion Procedure Release No. 20-01 (Aug. 14, 2020), https://www.justice.gov/criminal-fraud/file/1304941/download.
[92] US Department of Justice Foreign Corrupt Practices Act Review Opinion Procedure Release No. 20-01 (Aug. 14, 2020), https://www.justice.gov/criminal-fraud/file/1304941/download.

services during the relevant time period."[93] Ultimately, the requestor succeeded in purchasing the portfolio of assets from the Country A Office, and the Country B Office subsequently sought a fee of 0.5% of the purchased assets—equivalent to $237,500—for services on the requestor's behalf.[94] From these facts, the DOJ concluded that it did "not presently intend to take any enforcement action."[95] The DOJ noted there was "no information evincing a corrupt intent to offer, promise, or pay anything of value to a 'foreign official,'" as (1) the payment in question was to be made to the Country B Office, rather than to an individual; (2) there was no indication that the money would be "diverted to any individual," no indication that the payment was "intended to corruptly influence a foreign official," and no "corrupt offers, promises, or payments"; and (3) the payment was commercially reasonable and commensurate with the "specific, legitimate services from the Country B Office" the requestor had received.[96] Given that the principles discussed in the opinion are fairly straightforward, it is unclear why the requestor felt DOJ guidance was necessary.

12. New SEC Rule for Extractive Industries

In December 2020, SEC Chair Jay Clayton and two SEC commissioners approved a rule that would require resource extraction issuers (i.e., oil, gas, and mining companies) to file annual reports with the Commission disclosing certain payments to the US government or any foreign government made in connection with the commercial development of extractive resources, with certain exceptions.[97] The rule implements Section 13(q) of the Securities Exchange Act, added by the Dodd-Frank Wall Street Reform and Consumer Protection Act.[98] The Commission announced that the proposed rule is intended to increase transparency of payments made to governments in connection with commercial extractive resource development and comply with the Congressional Review Act.[99] The final rule will become effective 60 days after publication in the Federal Register, which occurred on January 15, 2021.[100] The rule has resulted in some controversy, and is discussed below in further detail.[101]

13. The CFTC Targets Bribery-Related Market Manipulation

In addition to developments from the DOJ and SEC, in WilmerHale's 2019 FCPA Year-In-Review, we discussed the CFTC's March 2019 Enforcement Advisory, by which the CFTC announced it would pursue foreign corruption matters, seeking to hold firms accountable for the impact of

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[93] US Department of Justice Foreign Corrupt Practices Act Review Opinion Procedure Release No. 20-01 (Aug. 14, 2020), https://www.justice.gov/criminal-fraud/file/1304941/download.
[94] US Department of Justice Foreign Corrupt Practices Act Review Opinion Procedure Release No. 20-01 (Aug. 14, 2020), https://www.justice.gov/criminal-fraud/file/1304941/download.
[95] US Department of Justice Foreign Corrupt Practices Act Review Opinion Procedure Release No. 20-01 (Aug. 14, 2020), https://www.justice.gov/criminal-fraud/file/1304941/download.
[96] US Department of Justice Foreign Corrupt Practices Act Review Opinion Procedure Release No. 20-01 (Aug. 14, 2020), https://www.justice.gov/criminal-fraud/file/1304941/download.
[97] Clara Hudson, *SEC Approves Long-Debated Disclosure Rule on Foreign Government Payments*, GLOBAL INVESTIGATIONS REVIEW (Dec. 16, 2020), https://globalinvestigationsreview.com/just-anti-corruption/anti-corruption/sec-approves-long-debated-disclosure-rule-foreign-government-payments.
[98] 15 U.S.C. § 78m(q)(2)(A).
[99] US Securities and Exchange Commission Press Release No. 2020-318: SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020).
[100] 86 Fed. Reg. 4662 (Jan. 15, 2021).
[101] *See infra* at pp. 77-78.

corruption on commodities trading activities using its enforcement powers under the Commodity Exchange Act, not the FCPA.[102] We predicted in the 2019 Year-In-Review that the CFTC would be eager to follow this advisory with enforcement actions in this space.

In December 2020, the CFTC announced that it had filed and settled charges against energy and commodities firm Vitol for manipulative and deceptive conduct that involved foreign corruption and related market manipulation.[103] The CFTC's announcement of the $95 million settlement came on the same day as the DOJ's announcement of a $135 million DPA with the company to resolve related bribery charges out of Brazil, Ecuador, and Mexico—and the CFTC's civil penalty will be credited against the criminal fine.[104] The settlement with Vitol is the CFTC's first enforcement resolution involving foreign corruption.[105]

KEY POLICY ANNOUNCEMENTS

A. Introduction

The year 2020 brought modest but important policy announcements, clarifications, and developments from the DOJ and SEC, and especially from the former. *First*, as noted above, the DOJ issued revisions to its Compliance Guidance, placing new emphasis on compliance resources, the collection and use of compliance data, and efforts to continually enhance and scale a company's compliance efforts. *Second*, the DOJ and SEC issued the second edition of the FCPA Resource Guide, incorporating many of the policies issued by the DOJ since 2012, addressing several important case law developments, and providing updated illustrations of different statutory elements drawn from recent resolutions. *Finally*, the DOJ's Fraud Section created a dedicated Privilege Review Team to address privilege issues at all stages of investigations and litigation, an evolution of its prior use of taint teams and coming in the wake of recent judicial determinations finding that those teams had not adequately safeguarded legally privileged communications and materials obtained from investigation subjects through seizure.

B. Revised Guidance on Evaluation of Corporate Compliance Programs

In June 2020, then-Criminal Division AAG Benczkowski announced changes to the DOJ's Compliance Guidance (2020 Guidance), the third such iteration.[106] The Compliance Guidance was first issued in March 2017 (2017 Guidance) and subsequently updated in April 2019 (2019

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[102] WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020* (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.
[103] US Commodities Future Trading Commission Release No. 8326-20: CFTC Orders Vitol Inc. to Pay $95.7 Million for Corruption-Based Fraud and Attempted Manipulation (Dec. 3, 2020).
[104] US Department of Justice Press Release No. 20-1310: Vitol Inc. Agrees to Pay over $135 Million to Resolve Foreign Bribery Case (Dec. 3, 2020); US Commodities Future Trading Commission Release No. 8326-20: CFTC Orders Vitol Inc. to Pay $95.7 Million for Corruption-Based Fraud and Attempted Manipulation (Dec. 3, 2020).
[105] US Commodities Future Trading Commission Release No. 8326-20: CFTC Orders Vitol Inc. to Pay $95.7 Million for Corruption-Based Fraud and Attempted Manipulation (Dec. 3, 2020).
[106] US Department of Justice, Evaluation of Corporate Compliance Programs (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.

Guidance). In a statement, AAG Benczkowski noted that the 2020 Guidance "reflects additions based on [the DOJ's] experience and important feedback from the business and compliance communities."[107]

As compared to the 2019 Guidance, which reorganized and nearly doubled the length of the 2017 Guidance, the 2020 Guidance is a more modest and less comprehensive update. Still, the 2020 Guidance provides useful information about the DOJ's priorities when it evaluates compliance programs.

1. Key Changes

The most notable changes suggest enhanced focus on three areas: a program's resources, data aggregation and analysis, and continuous evolution and enhancement.

a. Compliance Resources

The 2020 Guidance, like its predecessor documents, frames the evaluation of corporate compliance programs in terms of the questions that prosecutors should consider when conducting an investigation, determining whether to bring charges, and negotiating plea or other settlement agreements. As in the 2019 Guidance, the 2020 Guidance sets forth the same three "fundamental questions" a prosecutor should ask with respect to a company's compliance program:

1. Is the corporation's compliance program well designed?
2. Is the program being applied earnestly and in good faith?
3. Does the corporation's compliance program work in practice?[108]

While the three fundamental questions remain the same, the 2020 Guidance updates the explanatory text that follows the second question, increasing the focus on a program's resources and independence. Whereas the text previously asked simply whether the program was "implemented effectively," the revised text now asks whether the program is "adequately resourced and empowered" to function effectively.[109] Along with the amended explanatory text, a subsection of the 2020 Guidance—"Autonomy and Resources"—now encourages prosecutors to ask about the reasons for a company's "structural choices" and about how a company invests in the training and development of its compliance and controls personnel.[110] This change suggests that the DOJ will carefully scrutinize the resources and authority given to a company's compliance function.

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[107] *See* Dylan Tokar, *Justice Department Adds New Detail to Compliance Evaluation Guidance*, THE WALL STREET JOURNAL (June 1, 2020), https://www.wsj.com/articles/justice-department-adds-new-detail-to-compliance-evaluation-guidance-11591052949.
[108] US Department of Justice, Evaluation of Corporate Compliance Programs, at 2 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[109] US Department of Justice, Evaluation of Corporate Compliance Programs, at 2 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[110] US Department of Justice, Evaluation of Corporate Compliance Programs, at 11-12 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.

b. Data Aggregation and Analysis

Unlike the previous versions of the Guidance, the 2020 Guidance emphasizes the importance of a compliance program's use of data. For example, regarding policies and procedures, the 2020 Guidance asks whether a company tracks access to its policies and procedures in order to understand which policies are attracting attention from relevant employees.[111] Regarding the effectiveness of a company's reporting mechanism, the 2020 Guidance now asks whether the company tests employee awareness of and comfort with using the company hotline.[112] And regarding periodic risk assessments, the 2020 Guidance suggests that such review should be based upon continuous access to operational data and cross-functional information and not just based on a "snapshot" in time.[113] Moreover, in the section on "Autonomy and Resources," the 2020 Guidance adds questions that probe whether compliance and control personnel have access to data sources sufficient to allow for timely and effective monitoring and testing of policies, controls, and transactions or whether there are limitations to such access. The 2020 Guidance goes on to suggest that companies should take steps to address any such limitations on access.

While the 2020 Guidance anticipates that expectations of corporate compliance programs will differ based on a company's size, structure, and risk profile, these changes show that the DOJ is placing increasing importance on the data-driven aspects of a compliance program and how the analysis of this data can identify and respond to risk, as discussed above in further detail.[114]

c. Continuous Evolution and Enhancement

In an extension of the long-accepted principle that there is no "one-size-fits-all" approach to creating an effective compliance program, the 2020 Guidance makes explicit that a strong compliance program is one that evolves and responds to changes in the company, its business or industry, and its geographic footprint. The 2020 Guidance directs prosecutors to try to understand why a compliance program has been set up the way that it has been and how the program has evolved over time.[115] New language asks prosecutors to consider a company's process for tracking and incorporating "lessons learned" into its periodic risk assessments, either from the company's own prior issues or from peer companies,[116] and whether a company reviews and adapts its program based upon those lessons.[117]

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[111] US Department of Justice, Evaluation of Corporate Compliance Programs, at 4 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[112] US Department of Justice, Evaluation of Corporate Compliance Programs, at 6 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[113] US Department of Justice, Evaluation of Corporate Compliance Programs, at 3 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[114] *See supra* at p. 17.
[115] US Department of Justice, Evaluation of Corporate Compliance Programs, at 3 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[116] US Department of Justice, Evaluation of Corporate Compliance Programs, at 4 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[117] US Department of Justice, Evaluation of Corporate Compliance Programs, at 16 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.

The DOJ's encouragement to companies that they rely on data and lessons learned to inform changes to their compliance programs dovetails with the DOJ's expectation that the evolution of a company's compliance program is responsive to data and past experiences. Accordingly, the additions in the 2020 Guidance instruct that the demonstration of a strong compliance program will involve tracing the developmental arc of the program itself, with an explanation of how the program has matured in response to new or changing risk, as well as how the company has considered the availability of new tools or resources for the program.

2. Other Notable Changes

Two other changes to the 2020 Guidance are noteworthy, as they make explicit for the first time certain considerations the DOJ will employ when evaluating compliance programs.

First, in the section on "Third Party Management," a new question reflects the DOJ's expectation that companies "engage in risk management throughout the lifespan of the relationship," rather than only "during the onboarding process," which on its own may not be sufficient to address third party risks.[118] While the need for ongoing management of third parties throughout the third party lifecycle is not new and these concepts were in the earlier versions of the Compliance Guidance, this specific articulation of the DOJ's expectations for post-retention monitoring is new.

Second, in a new endnote in the 2020 Guidance, the DOJ for the first time has acknowledged that a company—and its compliance program—may be subject to many non-US laws and regulations. The new endnote instructs prosecutors to take into account that aspects of a company's compliance program may be affected by foreign law considerations, and to inquire how a company came to its conclusions about its foreign law obligations and how it ensured that these obligations did not diminish the program's effectiveness.[119] As many countries continue to enact or modify data privacy laws that could affect, for instance, management of third party relationships, companies are likely to continue to face these types of questions moving forward.

C. Second Edition of the FCPA Resource Guide

In July 2020, the DOJ and SEC released the second edition of the Resource Guide to the US Foreign Corrupt Practices Act (2020 Resource Guide), the first substantive update since the Resource Guide was first issued in November 2012 (2012 Resource Guide).[120] While not ground-breaking, the 2020 Resource Guide updates the 2012 Resource Guide in three main ways: *first*, it incorporates significant DOJ policies that have been released since the issuance of the 2012 Resource Guide; *second*, it incorporates the court decisions in the *Kokesh*, *Hoskins*, and *Esquenazi* matters, with critical notes regarding the principles viewed by the government as not

[118] US Department of Justice, Evaluation of Corporate Compliance Programs, at 7-8 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[119] US Department of Justice, Evaluation of Corporate Compliance Programs, at 19 (June 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.
[120] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act (2020), https://www.justice.gov/criminal-fraud/file/1292051/download.

generally applicable; and *third*, it updates the case examples throughout the Resource Guide with references to recently resolved matters and others that reflect important legal developments.

1. Incorporation of Post-2012 DOJ Guidance and Policies

It is important to note that almost all of the new content in the 2020 Resource Guide is drawn from guidance issued by the DOJ since 2012. In contrast, the SEC has issued very little formal guidance since 2012 and its enforcement decisions appear to remain guided primarily by its *2001 Seaboard Report*[121] (later incorporated in the SEC's Enforcement Manual). As a result, certain sections of the 2020 Resource Guide are carefully drafted to make clear that they only apply to the DOJ and should not be construed as being binding on (or are indicative of the approach taken by) the SEC. Specifically, when discussing the DOJ's Corporate Enforcement Policy, the 2020 Resource Guide expressly stated that "[t]he CEP applies only to DOJ, and does not bind or apply to SEC."[122] More generally, although many of the factors applied by the SEC in determining whether to bring an enforcement action are similar to those applied by the DOJ, the 2020 Resource Guide simply notes that the SEC's FCPA enforcement decisions remain guided by the SEC's *Seaboard* factors, as incorporated into the SEC's Enforcement Manual.[123]

The 2020 Resource Guide incorporates the following post-2012 guidance and policies issued by the DOJ.

a. DOJ Corporate Enforcement Policy

In addition to materials referenced in the 2012 Resource Guide, like the Principles of Federal Prosecution[124] and the Principles of Federal Prosecution of Business Organizations,[125] the 2020 Resource Guide notes that the DOJ's decision-making will be guided by its 2017 FCPA Corporate Enforcement Policy (CEP),[126] which, among other things, increased incentives for self-disclosure by adding a presumption of a declination if certain cooperation, remediation, and disgorgement

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[121] US Securities and Exchange Commission Release No. 44969: Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001), http://www.sec.gov/litigation/investreport/34-44969.htm.
[122] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 52 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[123] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 79 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download. The SEC's policies regarding awarding cooperation credit are also set forth in the Seaboard Report, published in 2001. US Securities and Exchange Commission Release No. 44969: Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm.
[124] US Department of Justice, Principles Of Federal Prosecution, JUSTICE MANUAL § 9-27.000, https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution.
[125] US Department of Justice, Principles of Federal Prosecution Of Business Organizations, JUSTICE MANUAL § 9-28.000, www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations.
[126] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 51-52 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download. *See also* US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120, https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution; *id.* § 9-28.000, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.

standards are met.[127] The 2020 Resource Guide also reflects the caveat from the CEP that, in some cases, aggravating circumstances such as involvement by executive management of the company in the misconduct and criminal recidivism may warrant prosecution, self-disclosure notwithstanding. The 2020 Resource Guide notes that, "[a] declination pursuant to the CEP is a case that would have been prosecuted or criminally resolved except for the company's voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution."[128] While declinations under the CEP are made public as a matter of course, the 2020 Resource Guide marries policy guidance with actual exemplar declinations, which will likely prove a useful tool for analysis.

As noted above, references to the CEP in the 2020 Resource Guide are carefully preceded by "DOJ" and are included only in a section specific to the DOJ—the text makes clear that "[t]he CEP applies only to DOJ, and does not bind or apply to SEC."[129] Although many of the factors applied by the SEC are similar to those applied by the DOJ, with respect to this issue, the 2020 Resource Guide notes simply that the SEC's FCPA enforcement decisions remain guided by the SEC's *Seaboard* factors, as incorporated into the SEC's Enforcement Manual.[130]

b. DOJ's Evaluation of Corporate Compliance Programs

The 2020 Resource Guide describes the familiar hallmarks of an effective compliance program, noting that "no one-size-fits-all," and explaining the impact of strong compliance programs on charging decisions.[131] The 2020 Resource Guide incorporates the recent revisions to the DOJ's Compliance Guidance. Interestingly, unlike the sections incorporating the CEP, the SEC does appear to "sign on" to the inclusion of these new updated compliance guidance elements, although the content in the 2020 Resource Guide is necessarily limited to the evaluation of FCPA compliance programs whereas the DOJ's 2020 Compliance Guidance is much broader.

c. Guidance on the Selection and Imposition of a Compliance Monitor or Independent Consultant

The 2020 Resource Guide incorporates a discussion of considerations around the appointment and selection of compliance monitors or independent consultants. New to this section are considerations from the DOJ's 2018 memorandum on the Selection of Monitors in Criminal Division

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[127] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[128] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 77 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[129] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 52 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[130] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 79 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download. The SEC's policies regarding awarding cooperation credit are also set forth in the Seaboard Report, published in 2001. US Securities and Exchange Commission Release No. 44969: Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm.
[131] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 58 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.

Matters (2018 Monitor Memorandum),[132] a document that implied the tempering of the imposition of monitors and a potential narrowing of their scope of review during monitorships. The 2020 Resource Guide echoes some of the cost and prudential considerations noted in the 2018 Monitor Memorandum, ultimately restating that a monitorship will likely not be necessary when a company's program and controls are found to be effective at the time of resolution.[133]

While the 2018 Monitor Memorandum is clearly identified as a DOJ-issued document in the discussion, the 2020 Resource Guide includes changes to the factors relevant to both agencies when determining whether a compliance monitor is appropriate. For example, rather than focusing solely on the seriousness of the misconduct, the 2020 Resource Guide indicates that the "nature" of the misconduct will now also be considered. Additionally, the 2020 Resource Guide clarifies that both agencies will now take a full view of the evaluation of a company's compliance program from the time of misconduct to the present, whereas the 2012 Resource Guide focused on evaluating a program "at the time of the misconduct."[134]

d. "No Piling On" Policy

Finally, the 2020 Resource Guide explains that both the DOJ and SEC seek to avoid imposing duplicative penalties, forfeiture, and disgorgement relating to the same conduct, citing Braskem S.A.'s 2016 resolution between the DOJ, the SEC, and Brazilian and Swiss authorities as an example of how the agencies have sought to pursue this goal.[135]

However, the 2020 Resource Guide explicitly notes that only the DOJ has memorialized this practice of coordinating resolutions in its Policy on Coordination of Corporate Resolution Penalties (No Piling on Policy).[136] The 2020 Resource Guide reiterates the four basic principles set out in the DOJ's policy—essentially that US prosecutors should try to coordinate with international counterparts and domestic regulators to avoid duplicative resolutions for the same misconduct—

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[132] Brian A. Benczkowski, US Department of Justice, *Selection and Use of Monitors in Criminal Division Matters* (Oct. 11, 2018), https://www.justice.gov/criminal-fraud/file/1100366/download.
[133] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 74 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[134] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 74 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[135] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 74 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[136] US Department of Justice, Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct, JUSTICE MANUAL § 1-12.100, https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings. The Policy sets out four basic principles: (1) "Department attorneys should remain mindful of their ethical obligation not to use criminal enforcement authority unfairly to extract, or to attempt to extract, additional civil or administrative monetary payments;" (2) where multiple DOJ components investigate a company for the same conduct, "Department attorneys should coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties, and/or forfeiture against the company," with the "goal of achieving an equitable result;" (3) the DOJ "should also endeavor, as appropriate, to coordinate with and consider the amount of fines, penalties, and/or forfeiture paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the same misconduct;" and (4) the DOJ "should consider all relevant factors in determining whether coordination and apportionment between Department components and with other enforcement authorities allows the interests of justice to be fully vindicated," including "the egregiousness of a company's misconduct; statutory mandates regarding penalties, fines, and/or forfeitures; the risk of unwarranted delay in achieving a final resolution; and the adequacy and timeliness of a company's disclosures and its cooperation with the Department." *Id.*

and the related factors prosecutors should consider in determining how much to credit penalties paid to other federal, state, local, or foreign authorities.[137] In addition, at a December 2020 Global Investigations Review event, then-acting Deputy AAG of the DOJ Robert Zink warned companies that "[t]he policy is not intended to be exploited by companies to first strategically resolve with other enforcement authorities, often on an incomplete record with no acceptance of responsibility or corresponding admission of liability, only then later to be used against the department in subsequent criminal resolution discussions."[138]

e. Reduced Emphasis on Individual Accountability

In the discussion of factors the DOJ considers when deciding whether to open an investigation or bring charges, the 2020 Resource Guide places little emphasis on the prosecution of individuals and the DOJ's expectations for cooperation by corporations under investigation to provide information to assist such prosecutions. Although the 2020 Resource Guide points to "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance" as one of ten factors to be considered when determining whether to charge a corporation,[139] there is little discussion of the DOJ's expectations for what steps corporations should take to assist in the prosecution of individuals responsible for misconduct. Notably, the 2020 Resource Guide does not refer to the DOJ's 2015 Memorandum on Individual Accountability for Corporate Wrongdoing (Yates Memo).[140] Authored by then-Deputy Attorney General Sally Q. Yates, the Yates Memo required corporations to provide the DOJ with "all relevant facts relating to the individuals responsible for the misconduct."[141] In 2018, the DOJ slightly modified this approach and allowed companies seeking cooperation credit in criminal cases to identify every individual who was substantially involved in or responsible for the criminal conduct.[142] The 2020 Resource Guide, however, neither refers to the "all relevant facts" requirement in the Yates Memo nor discusses the changes to that requirement made in 2018. Juxtaposed against repeated statements from DOJ officials emphasizing that individual prosecutions remain a priority, the lack of emphasis on the importance of prosecuting individuals and for companies under investigation to cooperate in providing information on individual malfeasance is notable.[143]

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[137] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 71 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[138] Clara Hudson, DOJ official warns against exploiting the anti-piling on policy, GLOBAL INVESTIGATIONS REVIEW (Dec. 9, 2020), https://globalinvestigationsreview.com/just-anti-corruption/enforcement/doj-official-warns-against-exploiting-the-anti-piling-policy.
[139] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 51 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[140] Sally Q. Yates, Deputy Attorney General, US Department of Justice, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), https://www.justice.gov/archives/dag/file/769036/download.
[141] Sally Q. Yates, Deputy Attorney General, US Department of Justice, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015), at 2, https://www.justice.gov/archives/dag/file/769036/download.
[142] US Department of Justice, Principles of Federal Prosecution, JUSTICE MANUAL § 9-27.700, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700; Rod. J. Rosenstein, Deputy Attorney General, US Department of Justice, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.
[143] *See, e.g.*, Rod J. Rosenstein, Deputy Attorney General, US Department of Justice, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-

2. Incorporation of *Esquenazi*, *Hoskins*, and *Kokesh* Decisions

Since 2012, courts have weighed in on several important issues relevant to the FCPA. While the incorporation of the decisions in *United States v. Esquenazi*, *United States v. Hoskins*, and *Kokesh v. SEC* into the 2020 Resource Guide comes as no surprise, the extent to which the enforcement authorities seek to downplay the significance of *Hoskins* may indicate their intention to contest this ruling in other contexts in the future.

a. *United States v. Esquenazi*

In 2014, the US Court of Appeals for the Eleventh Circuit in *United States v. Esquenazi* provided a two-part definition of government "instrumentality" and outlined a list of non-exhaustive factors to consider when applying each part of the test.[144] The Eleventh Circuit defined "instrumentality" under the FCPA as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."[145] The decision generally supported the position previously advanced by the US government and memorialized in the 2012 Resource Guide that the FCPA prohibits payments to employees of government-owned and -controlled entities, even when those entities operate in the commercial arena.[146] The 2020 Resource Guide accordingly replaces the list of factors borrowed from prior cases included in the 2012 Resource Guide with the *Esquenazi* factors.[147]

b. *United States v. Hoskins*

In *United States v. Hoskins*, the Second Circuit considered whether a nonresident foreign national acting entirely outside the United States and who is not an employee or agent of a domestic company can be prosecuted on a theory of conspiracy to commit or accessory liability to a violation of the FCPA where they otherwise could not be charged with a substantive violation of the statute.[148] The court ultimately answered in the negative, affirming the lower court's ruling that the government cannot charge the defendant with conspiracy to violate the FCPA's domestic concern provision (15 U.S.C. § 78dd-2) absent an agency relationship, nor could it charge a defendant with conspiracy to violate the territorial provisions (§ 78dd-3) absent proof that the defendant committed an act in furtherance of a bribe while physically present in the United States.[149]

Perhaps not surprisingly, the 2020 Resource Guide does not give much weight to the Second Circuit's *Hoskins* decision. Instead, it asserts that "[a] foreign company or individual may be held

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rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement (stating that the DOJ would focus on identifying individuals "who play significant roles in setting a company on a course of criminal conduct" in an effort to identify those individuals "who devised and authorized criminal schemes.").

[144] *United States v. Esquenazi*, 752 F.3d 912, 925, 928-29 (11th Cir. 2014).

[145] *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014).

[146] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 20-21 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.

[147] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 20 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.

[148] *United States v. Hoskins*, 902 F.3d 69, 97 (2d Cir. 2018).

[149] *United States v. Hoskins*, 902 F.3d 69, 71-72 (2d Cir. 2018).

liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States,"[150] and emphasizes *Hoskins*' potentially limited reach as a Second Circuit decision that has not been followed by "[a]t least one district court from another circuit."[151] Notably, in its discussion of accounting controls, the 2020 Resource Guide also mentions that the accounting provisions, unlike the FCPA anti-bribery provisions, apply to "any person" and therefore are not subject to the constraints laid out in *Hoskins*.[152]

c. *Kokesh v. SEC*

In 2017, the Supreme Court unanimously held that disgorgement imposed as a sanction for violating federal securities law constituted a "penalty" and was subject to a five-year statute of limitations under 28 U.S.C. § 2462.[153] Amending its prior guidance that 28 U.S.C. § 2462 "does not prevent [the] SEC from seeking equitable remedies, such as injunction, for conduct pre-dating the five-year period," the 2020 Resource Guide clarifies that, after *Kokesh*, disgorgement is a penalty, not an equitable remedy.[154]

But while acknowledging that *Kokesh* applies to disgorgement actions,[155] the 2020 Resource Guide's section on forfeiture and disgorgement still appears to reject the characterization of "disgorgement" as a penalty, noting that, different from a penalty or a fine, the purpose of disgorgement is "primarily to return the perpetrator to the same position as before the crime, ensuring that the perpetrator does not profit from the misconduct."[156] The 2020 Resource Guide also briefly mentions the Court's recent holding in *Liu v. SEC*, discussed below in further detail,[157] that the SEC may obtain disgorgement provided the disgorgement is awarded to the victims and does not exceed a wrongdoer's net profits.[158]

3. Updated Case Examples

The 2020 Resource Guide also incorporates descriptions of several recent corporate resolutions.

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[150] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 36 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[151] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 36 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download. *See also United States v. Firtash*, 392 F. Supp. 3d 872, 889 (N.D. Ill. 2019).
[152] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 46 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[153] *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017). 28 U.S.C. § 2462 applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise" brought by any government entity.
[154] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 37 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[155] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 37 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[156] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 71 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.
[157] *See infra* at pp. 66-68.
[158] *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020).

a. Offers and Promises

The 2020 Resource Guide makes clear that not only payments, but also offers and promises of things of value made to gain or maintain direct or indirect business advantages can violate the FCPA,[159] and that this includes "offers" for which no improper payment is ultimately made.[160] The 2020 Resource Guide cites a resolution with Joohyun Bahn in 2018, in which Bahn promised a middleman that he would pay a $2.5 million dollar bribe to a government official to induce business and paid the middleman $500,000 upfront, although the middleman did not in fact have a relationship with the foreign official and never passed along any money.[161] Bahn pleaded guilty to charges brought by both the DOJ and SEC.[162]

b. Things of Value

The 2020 Resource Guide also offers updated examples of categories of benefits that have previously been established as being "of value." As an example of "large extravagant gift-giving," the 2020 Resource Guide points to the November 2017 DOJ resolution with SBM Offshore N.V.,[163] which involved providing government officials with travel to sporting events, "spending money," luxury vehicles, and school tuition for their children.[164] As an example of improper travel and entertainment expenses, the 2020 Resource Guide points to the December 2019 DOJ settlement with Ericsson, which involved payment of millions of dollars to third parties, who used a portion of the funds to pay for gifts and entertainment for Chinese government officials, as well as purported training-related trips to the Caribbean, Las Vegas, and London—locations at which Ericsson had no facilities.[165]

c. Connected Hiring

As further examples of "things of value," the 2020 Resource Guide provides recent cases involving the hiring, promotion, and retention of the children of government officials. The guidance focuses

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[159] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 11 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download. The 2020 Resource Guide repeats the language of the statute, noting that the FCPA applies only to payments, offers, or promises made for the purpose of "(i) influencing any act or decision of a foreign official in his official capacity, (ii) inducing a foreign official to do or omit to do any act in violation of the lawful duty of such official, (iii) securing any improper advantage; or (iv) inducing a foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality."

[160] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 13 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.

[161] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 13 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.

[162] US Department of Justice Press Release No. 18-11: New Jersey Real Estate Broker Pleads Guilty to Role in Foreign Bribery Scheme Involving $800 Million International Real Estate Deal (Jan. 5, 2018); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Joohyun Bahn*, Rel. No. 84054, File No. 3-18728 (Sep. 6, 2018).

[163] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 15 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download.

[164] Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-00686 (S.D. Tex. Nov. 29, 2017).

[165] US Department of Justice and US Securities and Exchange Commission, Resource Guide to the US Foreign Corrupt Practices Act, at 15 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download; US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019).

specifically on the July 2018 Credit Suisse Group AG resolution with the DOJ and SEC related to a Hong Kong subsidiary's "systematic scheme to hire, promote, and retain the children of Chinese officials in order to win business with those officials."[166]

d. Third Parties

The 2020 Resource Guide also provides new examples of the risks of using third party intermediaries, including the 2018 DOJ resolution with Société Générale S.A. and 2018 DOJ and SEC resolutions with Legg Mason Inc.,[167] as well as the aforementioned SBM Offshore resolution, where an intermediary was used to provide extravagant gifts and commissions to foreign government officials in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq.[168]

D. New Privilege Unit in DOJ Fraud Section

In May 2020, the DOJ revealed the creation of a "Privilege Review Team" within the newly formed "Special Matters Unit," and that the Chief of the Special Matters Unit would be responsible for overseeing issues related to privilege for the Fraud Section.[169] The job posting explained that the Chief of the Special Matters Unit will be in charge of dealing with issues relating to privilege at all stages of investigation and litigation, including "pre-indictment privilege litigation," establishing policies and procedures related to the collection and handling of evidence that may implicate privileges, and, where needed, implementing a filter review team.[170] The DOJ's previous approach to privilege issues involved tasking prosecutors from outside the case team with reviewing materials for privilege, without any other formal separation between the review team and the case team.[171] The DOJ's Justice Manual, which provided for these taint teams, states that such teams would be established to review material seized from attorneys' offices as well as business

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[166] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 16 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download; *see also* US Securities and Exchange Commission Press Release No. 2018-128: SEC Charges Credit Suisse with FCPA Violations (July 5, 2018); US Department of Justice Press Release No. 18-888: Credit Suisse's Investment Bank in Hong Kong Agrees to Pay $47 Million Criminal Penalty for Corrupt Hiring Scheme that Violated the FCPA.

[167] US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act, at 22 (2020), https://www.justice.gov/criminal-fraud/file/1306671/download; *see also* US Department of Justice Press Release No. 18-722: Société Générale S.A. Agrees to pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018); US Department of Justice Press Release No. 18-725: Legg Mason Inc. Agrees to Pay $64 Million in Criminal Penalties and Disgorgement to Resolve FCPA Charges Related to Bribery of Gaddafi-Era Libyan Officials (June 4, 2018); US Securities and Exchange Commission Press Release No. 2018-168: Legg Mason Charged with Violating the FCPA (Aug. 27, 2018).

[168] Deferred Prosecution Agreement, *United States v. SBM Offshore N.V.*, No. 17-CR-00686 (S.D. Tex. Nov. 29, 2017).

[169] US Department of Justice Criminal Division, Supervisory Trial Attorney (Chief, Special Matters Unit) Job Posting (updated May 1, 2020), https://www.justice.gov/legal-careers/job/supervisory-trial-attorney-chief-special-matters-unit.

[170] US Department of Justice Criminal Division, Supervisory Trial Attorney (Chief, Special Matters Unit) Job Posting (updated May 1, 2020), https://www.justice.gov/legal-careers/job/supervisory-trial-attorney-chief-special-matters-unit.

[171] US Department of Justice, Obtaining Evidence, JUSTICE MANUAL § 9-13.420, https://www.justice.gov/jm/jm-9-13000-obtaining-evidence.

organizations that may involve seizure of materials in the possession of the organization's legal advisors.[172]

However, recent judicial determinations found that taint teams used by the DOJ did not adequately safeguard legally privileged communications and materials obtained from investigation subjects through seizure. For instance, in June 2019, in *United States v. Elbaz*, prosecutors uploaded into their review database materials that were intended to be filtered through a taint team but were in fact never screened for privilege.[173] The prosecutors used the materials to develop their case, despite indications on some of the materials that they were protected communications.[174] While the court did not dismiss the case, it stated that the prosecutors committed "a significant error in judgment not justified by a perceived need to meet discovery deadlines," and ordered the government to "take all necessary steps to avoid similar errors in the future and will hold the [g]overnment fully accountable for any additional lapses."[175] This case, among others, may have led to the establishment of the dedicated privilege unit.

In contrast with *Elbaz*, a recent order in a healthcare fraud case may show that the new privilege unit is already serving its purpose. In December 2020, a federal district court in Louisiana approved a privilege review protocol involving the Special Matters Unit over objections from the defendant.[176] The proposed protocol involved the use of a filter team to segregate any materials over which the defendant or a third party might have a colorable privilege claim.[177] The defendant opposed the protocol because he viewed it as not sufficiently protective of his interests in material seized from his personal accounts or with his personal attorney, and in material that might be subject to a common interest privilege claim.[178] However, the court found that the government's filter team properly fulfilled its role and had provided the defendant with all materials over which he might assert a privilege claim, and thus the defendant's objections to the protocol were moot.[179]

KEY INVESTIGATION-RELATED DEVELOPMENTS

A. Notable Features of Corporate Resolutions

1. Continued SEC Reliance on Accounting Provisions, Including Rare Use of the Good Faith Requirement

As discussed above, in 2020, the SEC continued its practice of bringing FCPA actions against companies based solely on charges that companies violated the accounting provisions, with six

[172] US Department of Justice, Obtaining Evidence, JUSTICE MANUAL § 9-13.420, https://www.justice.gov/jm/jm-9-13000-obtaining-evidence.
[173] *United States v. Elbaz,* 396 F. Supp. 3d 583 (D. Md. 2019).
[174] *United States v. Elbaz*, 396 F. Supp. 3d 583, 596 (D. Md. 2019).
[175] *United States v. Elbaz*, 396 F. Supp. 3d 583, 596 (D. Md. 2019).
[176] Order Granting Government's Motion for Discovery Protocol*, United States v. Khalid Ahmed Satary*, No. 19-CR-00197 (E.D. La. Dec. 2, 2020).
[177] Order Granting Government's Motion for Discovery Protocol*, United States v. Khalid Ahmed Satary*, No. 19-CR-00197 (E.D. La. Dec. 2, 2020).
[178] Order Granting Government's Motion for Discovery Protocol*, United States v. Khalid Ahmed Satary*, No. 19-CR-00197 (E.D. La. Dec. 2, 2020).
[179] Order Granting Government's Motion for Discovery Protocol*, United States v. Khalid Ahmed Satary*, No. 19-CR-00197 (E.D. La. Dec. 2, 2020).

such cases brought in 2020.[180] Unlike in past years when the SEC has brought some cases only based only on the accounting provisions without any bribery-related allegations described in the settlement papers, all six of these enforcement actions brought by the SEC in 2020 did include bribery-related allegations. In each instance, the SEC charged that the parent issuer's accounting controls were insufficient to detect or prevent the alleged improper payments.

For example, the Herbalife papers describe the extensive use of gifts and entertainment to corruptly influence Chinese government officials. The SEC alleged that over the course of a decade, Herbalife employees provided Chinese government officials with gifts, travel, alcohol, meals, and entertainment.[181] In one specific instance, the SEC alleged that Herbalife China personnel involved in obtaining direct selling licenses from a Chinese government agency confirmed in a telephone discussion that "money" had been provided to a Chinese government official employed by that agency.[182] Similarly, the DOJ alleged that between 2007 and 2016, Herbalife reimbursed employees more than $25 million for gifts and entertainment for Chinese officials, and that a portion of those funds were for "improper purposes."[183] Despite the significant misconduct described in the papers, and that the Statement of Facts appended to Herbalife's DPA states that Herbalife "provide[d] corrupt payments and benefits to Chinese government officials," the DOJ limited the charge to conspiracy to violate the books and records provision and the SEC limited its charges to violations of the accounting provisions.[184]

The SEC's enforcement action against Alexion Pharmaceuticals also contained allegations of significant improper payments. According to the SEC, two Alexion subsidiaries in Turkey and Russia allegedly made improper payments to foreign officials "in order to influence them to provide favorable regulatory treatment" in connection with the Alexion drug Soliris.[185] Specifically, the SEC alleged that Alexion Turkey, as suggested by a senior government official at Turkey's Ministry of Health, made payments to government officials through a third-party consultant it hired to assist with the patient approval process to boost approvals of Soliris.[186] In addition, the SEC found that Alexion Turkey made payments to healthcare professionals (HCPs) to improperly influence the

[180] *See supra* at pp. 12-14; Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cardinal Health, Inc.*, Rel. No. 88303, File No. 3-19718 (Feb. 28, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751 (Apr. 17, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852 (July 2, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Herbalife Nutrition Ltd.*, Rel. No. 89704, File No. 3-19948 (Aug. 28, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of J&F Investimentos S.A.*, Rel. No. 90170, File No. 3-20124 (Oct. 14, 2020).
[181] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Herbalife Nutrition Ltd.*, Rel. No. 89704, File No. 3-19948, ¶ 2 (Aug. 28, 2020).
[182] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Herbalife Nutrition Ltd.*, Rel. No. 89704, File No. 3-19948, ¶ 9 (Aug. 28, 2020).
[183] Information, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443, ¶ 29 (S.D.N.Y. Aug. 28, 2020).
[184] Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443, Attachment A ¶ 13 (S.D.N.Y. Sept. 1, 2020); Order Instituting Cease-and-Desist Proceedings, *In the Matter of Herbalife Nutrition Ltd.*, Rel. No. 89704, File No. 3-19948, ¶¶ 35-36 (Aug. 28, 2020).
[185] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶¶ 2-3 (July 2, 2020).
[186] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶¶ 13-14 (July 2, 2020).

approval of patient prescriptions for Soliris.[187] The allegations related to Alexion Russia include alleged payments to HCPs in order to influence the HCPs to render favorable regional budget allocations, and to favorably influence Soliris' regulatory treatment.[188] Despite these allegations, the SEC only charged Alexion under the internal accounting controls and books and records provisions of the FCPA.[189]

The SEC also pursued charges in 2020 under 15 U.S.C. § 78m(b)(6)'s good faith requirement, a provision that the SEC has not used since 2002.[190] In April 2020, the SEC and Eni S.p.A., an Italian multinational oil and gas company, agreed to a settlement over charges that Eni violated the FCPA's books and records and internal accounting controls provisions through the actions of a minority-owned Algerian subsidiary, Saipem, S.p.A., which the SEC alleged Eni controlled.[191] Eni agreed to pay $24.5 million in disgorgement and pre-judgment interest.[192]

According to the SEC's 2020 resolution, between 2007 and 2010, Saipem entered into four sham contracts with an intermediary to win business from Algeria's state-owned oil company.[193] The SEC alleged that Saipem did little to no due diligence regarding the contracts, received no legitimate services in exchange for nearly €200 million paid under the contracts, and falsely categorized those payments as "brokerage fees" in its books and records.[194] The intermediary allegedly directed the funds paid under the contract to Algerian government officials or their designees.[195] At the time, Eni owned a 43% interest in Saipem.[196]

During the period in which this alleged scheme was in effect, the Chief Financial Officer of Saipem, who orchestrated the alleged scheme, became CFO of Eni.[197] According to the SEC, in that role, he continued to facilitate improper payments to the intermediary.[198] Eni also allegedly consolidated

[187] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶ 17 (July 2, 2020).
[188] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶ 22 (July 2, 2020).
[189] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶¶ 31-32 (July 2, 2020).
[190] Order Instituting Cease-and-Desist Proceedings, *In the Matter of BellSouth Corp.*, Rel. No. 45279, File No. 3-10678 (Jan. 15, 2002); US Securities and Exchange Commission Litigation Release No. 17310: SEC Settles Case Against BellSouth Corporation (Jan. 15, 2002).
[191] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751 (Apr. 17, 2020).
[192] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, § IV.B (Apr. 17, 2020).
[193] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶ 1 (Apr. 17, 2020).
[194] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶¶ 1, 3 (Apr. 17, 2020).
[195] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶ 3 (Apr. 17, 2020).
[196] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶ 1 (Apr. 17, 2020).
[197] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶ 2 (Apr. 17, 2020).
[198] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶ 2 (Apr. 17, 2020).

Saipem's financial statements into its own and, as a result, included the falsely recorded payments as "brokerage fees" in its own statements and filings.[199]

15 U.S.C. § 78m(b)(6) of the Exchange Act provides that when an issuer holds a non-controlling stake in a firm, the issuer need only exercise "good faith to use its influence, to the extent reasonable," to cause the minority-controlled firm "to devise and maintain a system of internal accounting controls" consistent with the Exchange Act's requirements.[200] According to the SEC, the CFO, as the principal finance officer at Eni, "could not have been proceeding in good faith to cause Saipem to devise and maintain sufficient internal accounting controls while simultaneously being aware of, and participating in, conduct at Saipem that undermined those controls."[201]

While the SEC's rare invocation of 15 U.S.C. § 78m(b)(6)'s good faith requirement is significant, the ascension of a senior executive at Saipem, who orchestrated the alleged scheme, to the role of CFO of Eni makes these circumstances unusual. Typically, in determining whether a company has made reasonable good faith efforts regarding the internal accounting controls of a non-controlled subsidiary, the SEC looks to circumstances such as the relative degree of the issuer's ownership of the entity and the local laws and practices governing the business operations of the country in which the entity is located.[202] In this case, however, the SEC concluded that the CFO's involvement foreclosed the argument that Eni was acting in good faith.[203]

As a result of this enforcement action, Eni joined the list of companies that have been charged with FCPA violations for a second time. In 2010, Eni and one of its subsidiaries, Snamprogetti Netherlands, B.V., were charged by the SEC with violating the books and records and internal accounting controls provisions of the FCPA. The SEC alleged that Eni and its subsidiary hired agents to pay more than $180 million in bribes to Nigerian government officials to secure contracts with Nigerian government-owned oil facilities. Those bribery payments were then concealed through falsification of Eni's books and records. The SEC's 2010 settlement with Eni and Snamprogetti required the two to jointly pay $125 million in disgorgement.

In its 2020 enforcement action against Eni, the SEC—not confined by the US Sentencing Guidelines—gave passing reference to the prior violation in 2010, noting that "Eni and its then-wholly-owned subsidiary . . . consented to a judgment entered by the US District Court for the Southern District of Texas that permanently enjoined Eni from violating the books and records and

[199] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶ 4 (Apr. 17, 2020).
[200] 15 U.S.C. § 78m(b)(2), (6).
[201] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶¶ 23-24 (Apr. 17, 2020).
[202] 15 U.S.C. § 78m(b)(6).
[203] *See* Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶ 24 (Apr. 17, 2020).

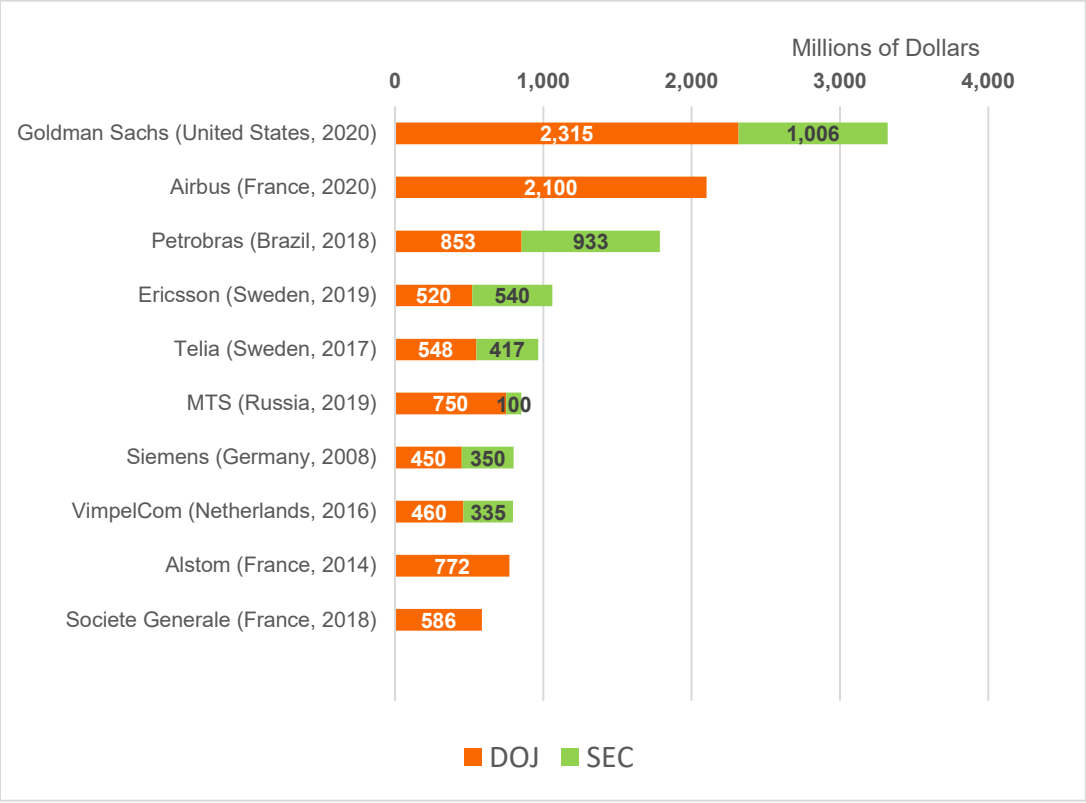
internal accounting controls provisions."[204] The SEC did not indicate what effect, if any, the prior violation had on calculating the 2020 penalty.

Although the fact that the SEC continued to bring actions in 2020 based solely on charges that companies violated the accounting provisions of the FCPA suggests ongoing reliance on such charges, the application of these provisions to a non-FCPA case yielded a strong dissent from two SEC commissioners, as discussed above in further detail.[205] Whether the FCPA Unit at the SEC alters its view on how broadly these provisions should be applied based on this dissent, or continues the approach it has taken in recent years, remains to be seen.

2. Blockbuster Resolutions: Goldman Sachs and Airbus

The largest resolutions of the year—which also represent the two largest penalties in history for violating the FCPA—illustrate a continued focus by US authorities on large cases with high-dollar outcomes.

Largest FCPA Settlements[206]



[204] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Eni S.p.A.*, Rel. No. 88679, File No. 3-19751, ¶ 8 (Apr. 17, 2020).
[205] *See supra* at pp. 13-14; *see also* Clara Hudson, *SEC Commissioners Rail Against "Unduly Broad" Use of Internal Controls Provision*, GLOBAL INVESTIGATIONS REVIEW (Nov. 13, 2020), https://globalinvestigationsreview.com/just-anti-corruption/sec-commissioners-rail-against-unduly-broad-use-of-internal-controls-provision.
[206] We have updated this bar chart from the 2019 Year-In-Review version to reflect only penalties imposed by US authorities for FCPA violations. We based the total amount for each entry on the total FCPA penalties in

a. Airbus

In January 2020, in order to resolve an eight-year investigation, French-headquartered aerospace company Airbus agreed to pay $2.1 billion in FCPA-related penalties as part of a three-year DPA with the DOJ. The DPA alleged one count each of conspiracy to violate the anti-bribery provisions, the Arms Export Control Act (AECA), and ITAR.[207] The DOJ coordinated with a joint investigation conducted by the UK Serious Fraud Office (SFO) and the French Parquet National Financier (PNF),[208] both of which ultimately imposed larger financial penalties on Airbus than did the United States and also entered into their own DPAs with Airbus.[209] The total global bribery-related penalties were approximately $4 billion.[210] The DOJ and US Department of State were also involved in investigating the ITAR-related misconduct.[211]

The DPA alleges that, between 2008 and 2015, members of Airbus's Strategy and Marketing Organization used consultants to pay bribes to government officials and executives at various state-owned airlines to purchase Airbus aircraft and satellites, and that between 2013 and 2015, Airbus made payments to business partners in China who used those funds to bribe Chinese officials, as part of a conspiracy to violate the FCPA's anti-bribery provisions.[212]

As mentioned above, the DOJ imposed a fine of approximately $2.1 billion for the FCPA violations.[213] However, the DOJ reduced the amount that Airbus was actually required to pay to the US Treasury for the FCPA violations to $294.5 million after crediting amounts paid to the PNF in

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DOJ and SEC resolution documents; as a result, we included amounts US authorities credited to foreign authorities. *See* US Department of Justice Press Release No. 20-1143: Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion (Oct. 22, 2020); US Department of Justice Press Release: Goldman Sachs Malaysia Pleads Guilty to Conspiracy to Violate the FCPA (Oct. 22, 2020); US Department of Justice Press Release No. 20-114: Airbus Agrees to Pay Over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020); US Department of Justice Press Release No. 18-1258: Petroleo Brasileiro S.A. – Petrobras Agrees to Pay More than $850 Million for FCPA Violations (Sept. 27, 2018); US Department of Justice Press Release No. 19-1360: Ericsson Agrees to Pay Over $1 Billion to Resolve FCPA Case (Dec. 6, 2019); US Department of Justice Press Release No. 17-1035: Telia Company AB and its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More Than $965 Million for Corrupt Payments in Uzbekistan (Sept. 21, 2017); US Department of Justice Press Release No. 19-200: Mobile Telesystems Pjsc and its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019); US Department of Justice Press Release No. 08-1105: Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008); US Department of Justice Press Release No. 16-194: VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Scheme (Feb. 18, 2016); US Department of Justice Press Release No. 14-1448: Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014); US Department of Justice Press Release No. 18-722: Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018).

[207] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021 (D.D.C. Jan. 1, 2020).

[208] Airbus Press Release: Airbus reaches agreement in principle with French, UK and US authorities (Jan. 28, 2020).

[209] US Department of Justice Press Release No. 20-114: Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020).

[210] Liz Alderman, *Airbus to Pay $4 Billion to Settle Corruption Inquiry*, N.Y. TIMES (Jan. 21, 2020), https://www.nytimes.com/2020/01/31/business/airbus-corruption-settlement.html.

[211] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021 (D.D.C. Jan. 31, 2020).

[212] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021 (D.D.C. Jan. 31, 2020).

[213] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021, at 12 (D.D.C. Jan. 31, 2020).

France,[214] in what appears to be an application of the DOJ's "No Piling On" policy.[215] The PNF imposed a USD-equivalent penalty of $2.29 billion for improper payments in China, Colombia, Nepal, Russia, Saudi Arabia, South Korea, Taiwan, and the United Arab Emirates, while the SFO imposed a USD-equivalent penalty of $1.09 billion (made up of disgorgement, a fine, and the SFO's costs) for improper payments in Ghana, Indonesia, Malaysia, Sri Lanka, and Taiwan.[216]

In addition to affecting the monetary penalties ultimately collected by the United States, the DOJ's coordination with other regulators appears to have affected the severity of the US resolution. For example, the DOJ did not impose an FCPA compliance monitor, possibly because Airbus will be subject to anti-corruption audits by the French authorities over the next three years.[217]

The Airbus resolution also sheds light on the DOJ's position regarding voluntary disclosure. While Airbus received cooperation credit for assisting the investigation[218] and also received remediation credit for rapid remedial steps,[219] the company did not receive voluntary disclosure credit. Airbus disclosed the conduct, but that disclosure occurred only after the SFO's investigation became public.[220] This highlights a potential conundrum for companies deciding whether (and how broadly) to self-disclose. To preserve potential voluntary disclosure credit and the possibility of a declination, companies must weigh whether to disclose to US authorities conduct with no apparent US ties in case a US nexus is later discovered in the course of an ongoing investigation.

In Airbus's case, the US nexus of the alleged conduct was lavish travel to the United States and entertainment provided to foreign officials in the United States, including executives of Chinese state-owned and state-controlled airlines, as well as business discussions with those officials via email and in person while in the United States.[221] However, the DOJ also acknowledged in the DPA that Airbus "is neither a US issuer nor a domestic concern, and the territorial jurisdiction over the corrupt conduct is limited."[222] Further, the DOJ stated in the DPA that "France's and the United Kingdom's interests over the Company's corruption-related conduct, and jurisdictional bases for a resolution, are significantly stronger," an observation that likely explains why the DOJ apparently

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[214] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021, at 12-14 (D.D.C. Jan. 31, 2020).
[215] *See* US Department of Justice Press Release No. 20-114: Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020).
[216] US Department of Justice Press Release No. 20-114: Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020).
[217] US Department of Justice Press Release No. 20-114: Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020).
[218] The DPA indicates that the company received cooperation credit for (1) gathering evidence and performing forensic data collections in multiple jurisdictions; (2) proactively identifying issues and facts that would likely interest the Fraud Section and DC USAO; and (3) presenting relevant facts to the Fraud Section and DC USAO. Deferred Prosecution Agreement, *United States v. Airbus SE*, Crim No. 20-CR-00021, at 4 (D.D.C. Jan. 31, 2020).
[219] The DPA noted that Airbus took steps to quickly terminate relationships with business partners involved in the alleged bribery-related conduct, separate and discipline former employees, hire new legal and compliance leadership, provide additional compliance training to employees, and enhance the internal controls. Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021, at 4 (D.D.C. Jan. 31, 2020).
[220] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021 (D.D.C. Jan. 31, 2020).
[221] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021, at 5 (D.D.C. Jan. 31, 2020).
[222] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021, at 5 (D.D.C. Jan. 31, 2020).

deferred to the United Kingdom the prosecution of the vast majority of the misconduct and credited so much of the FCPA penalties to France.[223]

The Airbus case followed a number of recent major anti-corruption cases in the international aviation industry, ranging from aircraft, engine, and component manufacturers, to airlines, and maintenance and repair organizations. It is likely that there will continue to be more enforcement activity in this industry, in large part because of the continued prevalence and importance of state-owned airlines around the globe, as well as economic pressures on the industry as a result of the COVID-19 pandemic's effect on the airline industry.

b. Goldman Sachs

In October 2020, New York financial institution Goldman Sachs entered into a DPA with the DOJ and a civil settlement with the SEC, agreeing to penalties of more than $3.3 billion[224] to resolve bribery charges in the United States. The resolution, which surpassed the $2.1 billion fine on Airbus announced just months earlier, is now the largest resolution in FCPA history. This resolution also resulted in Goldman Sachs replacing Kellogg Brown & Root LLC (KBR) as the only US company in the top ten largest FCPA resolutions in terms of FCPA penalties imposed. The DOJ and SEC resolutions with Goldman Sachs and its Malaysian subsidiary to resolve FCPA charges related to Goldman Sachs' role in a scheme to divert $2.7 billion dollars from 1MDB, a Malaysian sovereign wealth fund that was intended to finance projects for the benefit of the people of Malaysia.[225]

As has been the case with several large settlements in recent years, the Goldman Sachs resolution also implicates global coordination of enforcement activity. On the same date that the US government announced its settlement, the UK's Financial Conduct Authority (FCA) and the Bank of England fined Goldman Sachs International approximately $126 million (£96.6 million) for risk management failures connected to the 1MDB scheme.[226] In Singapore, the Attorney General imposed a penalty of $122 million on Goldman Sachs and required a payment of $61 million to 1MDB as disgorgement.[227] In Hong Kong, the Securities and Futures Commission noted Goldman Sachs Asia's "serious lapses and deficiencies" in its compliance controls and fined a local unit of Goldman Sachs $350 million.[228] Also, a couple of months prior, in July 2020, Goldman Sachs

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[223] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021, at 5 (D.D.C. Jan. 31, 2020).
[224] In calculating this figure, we only counted once the approximately $606 million in disgorgement that both the DOJ and SEC imposed as part of their resolutions, which in both cases was credited against payments.
[225] US Department of Justice Press Release: Goldman Sachs Resolves Foreign Bribery Case And Agrees To Pay Over $2.9 Billion (Oct. 22, 2020).
[226] Bank of England News Release: FCA and PRA fine Goldman Sachs International £96.6 million for risk management failures in connection with 1MDB (Oct. 22, 2020), https://www.bankofengland.co.uk/news/2020/october/fca-and-pra-fine-goldman-sachs-international-for-risk-management-failures-in-connection-with-1mdb.
[227] Monetary Authority of Singapore Joint Statement by Attorney-General's Chambers, Singapore (AGC), Commercial Affairs Department, Singapore Police Force (CAD), Monetary Authority of Singapore (MAS) (Oct. 23, 2020), https://www.mas.gov.sg/news/media-releases/2020/agc-cad-and-mas-take-action-against-goldman-sachs-singapore-pte-on-1mdb-bond-offerings.
[228] US Securities and Futures Commission News Release: SFC reprimands and fines Goldman Sachs (Asia) L.L.C. US$350 million for serious regulatory failures over 1Malaysia Development Berhad's bond offerings (Oct. 22, 2020), https://apps.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=20PR103.

settled charges with Malaysian prosecutors related to the conduct for $2.5 billion, along with a guarantee that Malaysia would receive at least $1.4 billion in proceeds from assets related to 1MDB seized by governmental authorities around the world.[229] In total, Goldman Sachs agreed to pay approximately $5.1 billion to governmental authorities worldwide.

The conduct, which took place between 2009 and 2014, allegedly involved now-former employees of Goldman Sachs in Asia orchestrating a scheme of theft and embezzlement that also included, according to the DPA, paying bribes through intermediaries—including Malaysian financier and fugitive, Jho Low—to high-ranking government officials in Malaysia and Abu Dhabi.[230] Some of the misappropriated money was allegedly used by the recipients to buy luxury apartments, yachts, Van Gogh and Monet paintings, and finance the movie "The Wolf of Wall Street."[231] The DOJ previously obtained a guilty plea from, and the SEC entered into a civil settlement with, former Goldman Sachs managing director Tim Leissner in 2018 and 2019, respectively, in connection with the scheme.[232] Another former Goldman employee, Roger Ng, was charged and is awaiting trial in January 2021 on foreign bribery and money laundering charges,[233] and a third former Goldman executive, Andrea Vella, was not charged, but has been barred from the financial industry by the Federal Reserve.[234]

The DOJ imposed a total criminal penalty of $2.3 billion (plus $606 million disgorgement) as part of the DPA in connection with a criminal information filed in the Eastern District of New York charging the company with conspiracy to violate the anti-bribery provisions of the FCPA.[235] The DPA states that Goldman's Sachs' obligation to pay the $2.3 billion criminal fine will be complete upon the total payment of about $1.27 billion, so long as "the remaining amount" is paid to the SEC and other enforcement authorities in the United States, United Kingdom, Singapore, and Hong Kong within a year.[236] Its Malaysian subsidiary, Goldman Sachs (Malaysia) Sdn. Bhd., pleaded guilty to a one-count criminal information charging it with conspiracy to violate the anti-bribery provisions of the

[229] The Goldman Sachs Group, Inc., Current Report (Form 8-K) (July 24, 2020), available at: https://sec.report/Document/0001193125-20-198162/.
[230] Deferred Prosecution Agreement, *United States v. The Goldman Sachs Group, Inc.*, No. 20-CR-00437, at 8-9 (E.D.N.Y. Oct. 22, 2020).
[231] Swiss police seize Monet and Van Gogh art linked to 1MDB, THE BBC (Jul. 22, 2016), https://www.bbc.com/news/world-asia-36863518; Rozanna Latiff, Malaysia to recover $107.3 Mln after settling 1MDB case against 'Wolf of Wall Street' producer, REUTERS (May 14, 2020), https://www.reuters.com/article/us-malaysia-politics-1mdb/malaysia-to-recover-107-3-mln-after-settling-1mdb-case-against-wolf-of-wall-street-producer-idUSKBN22Q0PL.
[232] Information, *United States v. Tim Leissner*, No. 18-CR-00439 (Aug. 28, 2018); US Securities and Exchange Commission Press Release No. 2019-260: SEC Charges Former Goldman Sachs Executive With FCPA Violations (Dec. 16, 2019).
[233] US Department of Justice Press Release No. 18-1429: Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018).
[234] US Federal Reserve Press Release: Federal Reserve Board announces it is permanently barring senior executive at Goldman Sachs from banking industry (Feb. 4, 2020).
[235] US Department of Justice Press Release: Goldman Sachs Resolves Foreign Bribery Case And Agrees To Pay Over $2.9 Billion (Oct. 22, 2020). Although the DOJ's press release refers to $2.9 billion as the amount that Goldman Sachs ultimately agreed to pay, our calculations take into account the total FCPA penalties imposed in the settlement papers (but do not double-count the disgorgement imposed by both the DOJ and SEC). This $3.3 billion figure does not take into account the crediting of payments made pursuant to related settlements.
[236] Deferred Prosecution Agreement, *United States v. The Goldman Sachs Group, Inc.*, No. 20-CR-00437, at 8-9, 11 (E.D.N.Y. Oct. 22, 2020).

FCPA.[237] Notably, the DOJ gave the company only partial cooperation credit, claiming that Goldman Sachs significantly delayed producing relevant evidence during the investigation, including recorded employee phone calls.[238] The company did not receive voluntary disclosure credit because it did not voluntarily and timely self-disclose the conduct.[239]

In a parallel enforcement action, the SEC charged Goldman Sachs with violations of the anti-bribery, internal accounting controls, and books and records provisions of the FCPA.[240] Goldman Sachs consented to a cease-and-desist order and agreed to pay $606.3 million in disgorgement (which was also covered by the DOJ resolution) and a $400 million civil penalty, with the amount of disgorgement satisfied by amounts it paid to the government of Malaysia and 1MDB in a related settlement from July 2020.[241]

3. Spotlight on the Life Sciences and Pharmaceutical Sector

Corporate resolutions in 2020 featured several major FCPA resolutions with life sciences and pharmaceutical companies: Alexion Pharmaceuticals, Inc.; Cardinal Health Inc., and a European pharmaceutical company and its current and former subsidiaries. These resolutions continue the focus of US authorities in recent years on this industry.

a. Alexion

In July 2020, the SEC and Alexion, a global biopharmaceutical company headquartered in Boston, Massachusetts, settled charges of books and records and internal accounting controls violations for conduct from 2010 to 2015 and involving four Alexion subsidiaries in Turkey, Russia, Brazil, and Colombia.[242]

According to the SEC, two Alexion subsidiaries in Turkey and Russia allegedly made improper payments to foreign officials “in order to influence them to provide favorable regulatory treatment" in connection with Alexion’s drug, Soliris.[243] Specifically, the SEC alleged that Alexion Turkey, as suggested by a senior government official at Turkey’s Ministry of Health, made payments to government officials through a third-party consultant it hired to assist with the patient approval process to boost approvals of Soliris.[244] In addition, the SEC found that Alexion Turkey made

[237] US Department of Justice Press Release: Goldman Sachs Resolves Foreign Bribery Case And Agrees To Pay Over $2.9 Billion (Oct. 22, 2020).
[238] Deferred Prosecution Agreement, *United States v. The Goldman Sachs Group, Inc.*, No. 20-CR-00437, at 4 (E.D.N.Y. Oct. 22, 2020).
[239] Deferred Prosecution Agreement, *United States v. The Goldman Sachs Group, Inc.*, No. 20-CR-00437, at 4 (E.D.N.Y. Oct. 22, 2020).
[240] Order Instituting Cease-and-Desist Proceedings, *In the Matter of The Goldman Sachs Group, Inc.*, Rel. No. 90243, File No. 3-20132 (Oct. 22, 2020).
[241] US Securities and Exchange Commission Press Release No. 2020-265: SEC Charges Goldman Sachs With FCPA Violations (Oct. 22, 2020).
[242] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals*, Inc., Rel. No. 89214, File No. 3-19852, ¶¶ 1, 5, 31-32 (July 2, 2020); US Securities and Exchange Commission Press Release No. 2020-149: SEC Charges Alexion Pharmaceuticals With FCPA Violation (July 2, 2020).
[243] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶¶ 2-3 (July 2, 2020).
[244] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶¶ 13-14 (July 2, 2020).

payments to healthcare professionals (HCPs) to improperly influence the approval of patient prescriptions for Soliris.[245] The allegations related to Alexion Russia include alleged payments to HCPs in order to influence the HCPs to render favorable regional budget allocations, and to favorably influence Soliris' regulatory treatment.[246] For example, Alexion Russia paid over $85,000 to physicians ostensibly for honoraria, research, and educational expenses at least in part to influence the budgetary and diagnostic standards in favor of Soliris.[247] In Brazil and Colombia, Alexion subsidiaries allegedly had "third parties to create inaccurate financial records concerning payments to third parties, including patient advocacy organizations."[248]

Alexion agreed to pay approximately $18 million in disgorgement and prejudgment interest, as well as a $3.5 million civil penalty.[249] In reaching the settlement terms, the SEC considered Alexion's remedial efforts, which "included strengthening and expanding its global compliance organization; enhancing its policies and procedures regarding payments to third parties, including the implementation of a centralized system to track and monitor third-party payments; revamping its HCP engagement process and oversight; enhancing its internal audit function; conducting proactive compliance market reviews; and improving training provided to employees regarding anti-corruption."[250]

b. Cardinal Health

In February 2020, the SEC settled with Cardinal Health, a global, integrated healthcare services and products company headquartered in Ohio, related to violations of the internal accounting controls and books and records provisions.[251] In contrast with Alexion, Cardinal Health is a pharmaceutical distributor, not a pharmaceutical manufacturer.

The SEC alleged that between 2010 and 2016, Cardinal Health China hired thousands of employees and managed marketing accounts for a large European dermocosmetic company whose products Cardinal Health China distributed.[252] The SEC alleged that the employees made payments to government-employed HCPs and employees at other state-owned companies.[253] In addition, the SEC order indicates that neither Cardinal Health nor Cardinal Health China took

[245] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶ 17 (July 2, 2020).
[246] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶ 22 (July 2, 2020).
[247] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶ 23 (July 2, 2020).
[248] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶ 26 (July 2, 2020).
[249] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, at 8 (July 2, 2020).
[250] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Alexion Pharmaceuticals, Inc.*, Rel. No. 89214, File No. 3-19852, ¶ 35 (July 2, 2020).
[251] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cardinal Health, Inc.*, Rel. No. 88303, File No. 3-19718, ¶¶ 1, 9, 24 (Feb. 28, 2020).
[252] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cardinal Health, Inc.*, Rel. No. 88303, File No. 3-19718, ¶ 11 (Feb. 28, 2020).
[253] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cardinal Health, Inc.*, Rel. No. 88303, File No. 3-19718, ¶ 15 (Feb. 28, 2020).

proactive steps to remediate the controls associated with the marketing account or marketing employees until 2016, despite recognizing the FCPA-compliance risks posed by marketing accounts in China as early as November 2010.[254] As a result of the conduct described in the SEC order, Cardinal Health agreed to pay $5.4 million in disgorgement and approximately $917,000 in prejudgment interest, and a civil penalty of $2.5 million.[255]

c. Swiss Pharmaceutical Company and Affiliated Entities

In June 2020, the DOJ and SEC reached resolutions with a global pharmaceutical company headquartered in Europe, in connection with its subsidiaries and affiliates engaging in schemes to make improper payments or to provide benefits to public and private HCPs in exchange for prescribing or using their products. This was the second FCPA resolution that this European pharmaceutical company settled with the US government in recent years. In the 2020 settlement, two of the company's current or former subsidiaries entered into separate three-year DPAs with the DOJ, under which they agreed to pay combined criminal fines totaling approximately $233 million. The European parent company entered into a settlement with the SEC of books and records and internal accounting controls provisions charges, paying the SEC $92.3 million in disgorgement and $20.5 million in prejudgment interest. The misconduct alleged in both actions related to the provision of benefits to employees at state-owned hospitals and clinics in Europe and Asia in an effort to increase the company's product sales.

As noted above, this FCPA resolution is the second entered into by the European pharmaceutical company in recent years. The factual allegations in the company's previous settlement with the SEC in 2016, on a neither-admit-nor-deny basis, were similar to those in its 2020 resolutions with the SEC and DOJ, involved similar fact patterns, and overlapped temporally during certain years. Notably, the DOJ did not reduce the company's fine in the 2020 settlement by the maximum amount possible because of the short span of time between the two matters, despite the subsidiaries' enhancement of their anti-corruption controls following the 2016 settlement. These two settlements serve as an important reminder that FCPA issues in one part of a business can signal the possibility of similar issues elsewhere in the company, and highlight the difficult judgment calls that companies and their outside counsel must make in deciding how widely to expand the scope of internal investigations and/or related risk reviews.

4. Insight into the Effect of Voluntary Disclosure and Cooperation on Penalties

Several of the DOJ's enforcement actions in 2020 provide additional insight into the implementation by the Department of its Corporate Enforcement Policy and the effect of a company's voluntary disclosure, cooperation, and remediation on penalties. The CEP provides benefits to companies charged with FCPA violations that voluntarily self-disclose, fully cooperate, and timely and

[254] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cardinal Health, Inc.*, Rel. No. 88303, File No. 3-19718, ¶¶ 17- 18, 23 (Feb. 28, 2020).
[255] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Cardinal Health, Inc.*, Rel. No. 88303, File No. 3-19718, at 7 (Feb. 28, 2020).

appropriately remediate deficiencies in their compliance program.[256] For example, a company that voluntarily self-discloses, fully cooperates, timely and appropriately remediates, and disgorges any profits obtained from the improper conduct will be presumed to receive a declination of prosecution, or, if there are aggravating circumstances, will receive a 50% reduction off the low end of the US Sentencing Guidelines fine range and avoid the imposition of an independent compliance monitor.[257] A company is not entitled to a 50% reduction if it is a "criminal recidivist."[258] If, however, a company fully cooperates and remediates, but fails to self-disclose, that company could receive *up to* 25% off the low end of the sentencing guidelines range.[259]

As discussed above, a self-disclosure will not always be viewed by the DOJ as meriting credit under the CEP. Under the CEP, a disclosure must be made "prior to an imminent threat of disclosure" and must be made "within a reasonably prompt time." In its DPA with Airbus, the DOJ concluded that the company's disclosure did not satisfy the CEP's voluntary self-disclosure requirements because the SFO investigation was already underway when the US disclosure was made.[260] The case thus provides a good lesson that companies must assess potential disclosures across multiple jurisdictions, even where the connection to the United States may appear tenuous.

The DOJ's August 2020 DPA with Herbalife, where the company agreed to pay over $55 million in criminal penalties for "engaging in a decade-long scheme to falsify its books and records to conceal corrupt and other improper payments to Chinese officials and state-owned entities," provides a good example of the consequences of not self-disclosing.[261] There, the DOJ highlighted that Herbalife failed to voluntarily disclose its conduct.[262] The DOJ alleged that executives at the company were aware of and participated in falsely recording improper payments to government officials as travel and entertainment, and falsifying Sarbanes-Oxley sub-certifications to the SEC.[263] Between 2007 and 2016, employees of the company falsified books and records and provided corrupt payments to Chinese government agencies and state-owned media to increase Herbalife's business in China.[264] The payments were made to obtain licenses, influence Chinese investigations into Herbalife's compliance with Chinese laws, and remove negative press coverage about Herbalife.[265] Despite this conduct, Herbalife received a two point reduction off its culpability

[256] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120, ¶ 1, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[257] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120, ¶ 1, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[258] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120, ¶ 1, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[259] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120, ¶ 2, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[260] Deferred Prosecution Agreement, *United States v. Airbus SE*, No. 20-CR-00021, ¶ 4(a) (D.D.C. Jan. 31, 2020).
[261] US Department of Justice Press Release No. 20-840: Herbalife Nutrition Ltd. Agrees to Pay Over $122 Million to Resolve FCPA Case (Aug. 28, 2020).
[262] Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443, ¶ 4(a) (S.D.N.Y. Sept. 1, 2020).
[263] Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443, at Attachment A ¶¶ 13-14 (S.D.N.Y. Sept. 1, 2020).
[264] Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443, at Attachment A ¶¶ 13-14 (S.D.N.Y. Sept. 1, 2020).
[265] Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443, at Attachment A ¶¶ 13-14 (S.D.N.Y. Sept. 1, 2020).

score for its full cooperation in the investigation and clear acceptance of responsibility for its conduct.[266] Ultimately, Herbalife paid approximately $55.7 million, reflecting a full 25% discount off the low end of the sentencing guidelines fine range for its cooperation and remediation after having not voluntarily disclosed.[267] If the company had voluntarily disclosed, it could have been eligible for a declination or a 50% discount. Herbalife also agreed to pay over $67 million to the SEC to resolve charges that it violated the books and records and internal accounting controls provisions, in connection with related conduct.[268] As is commonly the case, the extent to which the company received any credit from the SEC for its cooperation and remediation is less transparent.

In its resolution with J&F, the DOJ gave only partial cooperation and remediation credit to the company, while also noting that the company did not voluntarily disclose its conduct.[269] In parallel with a resolution J&F reached with the SEC,[270] the DOJ alleged that, between 2005 and 2017, J&F executives and intermediaries promised to and paid bribes to Brazilian government officials to ensure that certain entities would enter into financing and equity transactions to J&F's benefit.[271] J&F created shell companies to conceal the true nature of the payments to the government officials through bank accounts in New York.[272] J&F received only partial cooperation credit despite conducting an internal investigation, making presentations to the DOJ, and making foreign-based employees available for interviews, because, according to the DOJ, J&F declined to produce all relevant materials and did not provide all relevant information in a timely manner.[273] J&F also engaged in remedial measures. At the time of the conduct, J&F lacked an anti-corruption controls or compliance program.[274] Since the investigation, the DOJ noted that J&F created a compliance program, increased the culture of compliance within its company, and began conducting robust anti-corruption training that reached the highest levels of the company.[275] The DOJ imposed an approximately $256 million fine on J&F, which represented a 10% discount off the low end of the range due to J&F's partial cooperation and remediation.[276]

Beam Suntory Inc., which reached a resolution with the DOJ in October 2020, also did not receive full credit from the DOJ for cooperation and remediation. The DOJ accused Beam Suntory of falsely recording expenses from 2006 to 2012, which included disguising bribes to Indian

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[266] Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443, ¶ 7(d) (S.D.N.Y. Sept. 1, 2020).
[267] Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443, ¶ 7 (S.D.N.Y. Sept. 1, 2020).
[268] US Department of Justice Press Release No. 20-840: Herbalife Nutrition Ltd. Agrees to Pay Over $122 Million to Resolve FCPA Case (Aug. 28, 2020).
[269] Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-CR-00365, ¶¶ 7(a)-(c) (E.D.N.Y. Oct. 13, 2020).
[270] Order Instituting Cease-and-Desist Proceedings, *In the Matter of J&F Investimentos S.A.*, Rel. No. 90170, File No. 3-20124 (Oct. 14, 2020).
[271] Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-CR-00365, at Attachment A ¶ 17 (E.D.N.Y. Oct. 13, 2020).
[272] Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-CR-00365, at Attachment A ¶¶ 17, 19-20, 37-39, 47-48 (E.D.N.Y. Oct. 13, 2020).
[273] Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-CR-00365, ¶¶ 7(b)-(c) (E.D.N.Y. Oct. 13, 2020).
[274] Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-CR-00365, ¶ 7(e) (E.D.N.Y. Oct. 13, 2020).
[275] Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-CR-00365, ¶ 7(e) (E.D.N.Y. Oct. 13, 2020).
[276] Plea Agreement, *United States v. J&F Investimentos SA*, No. 20-CR-00365, ¶ 22(a) (E.D.N.Y. Oct. 13, 2020).

government officials as commission expenses.[277] The case was unusual in that Beam Suntory had previously settled charges brought by the SEC in 2018 relating to the same conduct, paying $8.2 million to resolve those charges. The reasons for settling the SEC and DOJ matters so far apart in time are not clear, and such a large temporal gap between resolutions is unusual. In the 2018 resolution, the SEC credited the company for its cooperation through the investigation.[278] But in the 2020 DPA, the DOJ expressed its view that Beam Suntory's cooperation was inconsistent.[279] For example, the DOJ explained how although the company made factual presentations and made foreign-based employees available for interviews, it also caused "significant delays" in reaching a resolution by its "refusal to accept responsibility for several years."[280] Further, although Beam Suntory implemented enhanced controls, the company did not receive full remediation credit due to its failure, according to the DOJ, to discipline certain individuals involved in the alleged conduct.[281] Beam Suntory received only a 10% discount off the low end of the sentencing guidelines range and was required to pay an approximately $19.5 million fine.[282]

Analysis of the Airbus, Herbalife, J&F, and Beam Suntory resolutions sheds light on the DOJ's application of the CEP and provides a window into the DOJ's award (or not) of credit for voluntary disclosure, cooperation, and remediation. While such steps by companies can result in significant benefits under the CEP, the DOJ will look closely at whether those steps fully comply with the requirements of the CEP. Where—in the DOJ's view—a company has not fully satisfied those requirements, the DOJ will not hesitate to reduce the amount of credit that might otherwise be available.

5. A Rare Corporate Guilty Plea by a US Parent and Use of the DOJ's Inability-to-Pay Guidance

FCPA resolutions in 2020 included a rare guilty plea by a US-based parent corporation. In September 2020, US-based corporate parent Sargeant Marine entered into a guilty plea with the DOJ, which typically happens with US subsidiaries of foreign companies rather than the parent corporations themselves.[283] Sargeant Marine, an asphalt company, pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA in connection with bribes paid through employees and agents to foreign officials in Brazil, Venezuela, and Ecuador.[284] To settle the charges, the company agreed to pay $16.6 million and periodically report on remediation and compliance

[277] Deferred Prosecution Agreement, *United States v. Beam Suntory Inc.*, No. 20-CR-00745, Attachment A ¶¶ 10-14 (N.D. Ill. Oct. 23, 2020).
[278] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Beam Inc.*, Rel. No. 83575, File No. 3-18568, at 8 ¶ B, ¶ 28 (July 2, 2018).
[279] Deferred Prosecution Agreement, *United States v. Beam Suntory Inc.*, No. 20-CR-00745, ¶ 4(c) (N.D. Ill. Oct. 23, 2020).
[280] Deferred Prosecution Agreement, *United States v. Beam Suntory Inc.*, No. 20-CR-00745, ¶¶ 4(b)-(c) (N.D. Ill. Oct. 23, 2020).
[281] Deferred Prosecution Agreement, *United States v. Beam Suntory Inc.*, No. 20-CR-00745, ¶¶ 4(e)-(f) (N.D. Ill. Oct. 23, 2020).
[282] Deferred Prosecution Agreement, *United States v. Beam Suntory Inc.*, No. 20-CR-00745, ¶¶ 7, 7(d) (N.D. Ill. Oct. 23, 2020).
[283] Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363 (E.D.N.Y. Sept. 22, 2020).
[284] US Department of Justice Press Release No. 20-983: Sargeant Marine Inc. Pleads Guilty and Agrees to Pay Over $16.6 Million to Resolve Charges Related to Foreign Bribery Schemes in Brazil, Venezuela, and Ecuador (Sept. 22, 2020).

measures for three years.[285] Previously, six individuals connected to this matter pleaded guilty to various charges, and a seventh connected individual was also charged.[286] While unusual, the guilty plea by the US parent likely was due to Sargeant Marine being a smaller, nonpublic company, where specific improper conduct by a senior executive and part owner, among other employees, was identified in the investigation.

Sargeant Marine engaged in similar conduct in Brazil, Venezuela, and Ecuador during various periods between 2010 and 2018, paying bribes in exchange for securing contracts with state-owned Petrobras, PDVSA, and PetroEcuador, respectively.[287] According to the plea agreement, Sargeant Marine, through its employees and agents, established relationships with middlemen to facilitate the bribes to foreign officials and sought to conceal the bribes through fake consulting agreements and invoices with payments sent to offshore accounts of the middlemen.[288] In addition to using bribes to obtain contracts, Sargeant Marine also obtained nonpublic information regarding PDVSA and to prompt PDVSA to pay demurrage fees.[289] As a result of this conduct, Sargeant Marine and its affiliates earned profits in excess of $38 million.[290]

Notably, Sargeant Marine received a reduced penalty of $16.6 million due to its inability to pay,[291] a circumstance that may become more prevalent this coming year due to the COVID-19 pandemic and the related economic fallout. As discussed in detail in last year's Year-in-Review, then-AAG Benczkowski released guidance in October 2019 regarding how the DOJ will evaluate corporate claims of inability to pay an otherwise appropriate criminal fine or monetary penalty.[292] The guidance provides a questionnaire for prosecutors to use to solicit information from companies claiming an inability to pay, highlights factors that courts consider when assessing a criminal fine under 18 U.S.C. § 3572, and discusses the US Sentencing Guidelines.[293] Additionally, the guidance emphasizes that penalty adjustments should be used only as necessary to avoid threatening the continued viability of the organization and/or impairing the organization's ability to

[285] US Department of Justice Press Release No. 20-983: Sargeant Marine Inc. Pleads Guilty and Agrees to Pay Over $16.6 Million to Resolve Charges Related to Foreign Bribery Schemes in Brazil, Venezuela, and Ecuador (Sept. 22, 2020).
[286] US Department of Justice Press Release No. 20-983: Sargeant Marine Inc. Pleads Guilty and Agrees to Pay Over $16.6 Million to Resolve Charges Related to Foreign Bribery Schemes in Brazil, Venezuela, and Ecuador (Sept. 22, 2020).
[287] Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363, Attachment A ¶ 26 (E.D.N.Y. Sept. 22, 2020).
[288] Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363, Attachment A ¶¶ 27-28, 47-48, 67-68 (E.D.N.Y. Sept. 22, 2020).
[289] Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363, Attachment A ¶¶ 57, 65 (E.D.N.Y. Sept. 22, 2020).
[290] Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363, Attachment A ¶ 26 (E.D.N.Y. Sept. 22, 2020).
[291] *See* Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363, ¶ 22b (E.D.N.Y. Sept. 22, 2020).
[292] WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 20-21 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.
[293] Brian A. Benczkowski, Assistant Attorney General, US Department of Justice, Memorandum on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Policy (Oct. 8, 2019), https://www.justice.gov/opa/speech/file/1207576/download.

make restitution to victims, and instructs prosecutors to evaluate, among other things, information about the company's current financial condition and alternative sources of capital.[294]

Consistent with that DOJ guidance, Sargeant Marine's plea agreement describes that the parties agreed that the maximum fine that would be imposed per offense was $76,091,358 (twice the pecuniary gain) and that the appropriate total criminal penalty would have been $90 million under the US Sentencing Guidelines.[295] It also states that the DOJ, with the assistance of a forensic accounting expert, conducted an ability-to-pay analysis and considered factors outlined in the DOJ's inability-to-pay guidance, including 18 U.S.C. § 3572, the US Sentencing Guidelines, Sargeant Marine's current financial situation arising from the recent sale of its joint venture interest, and Sargeant Marine's alternative sources of capital.[296] As a result of Sargeant Marine's representations and DOJ's independent verification, the DOJ assessed and Sargeant Marine agreed to pay a $16.6 million fine—the maximum criminal fine that would not substantially threaten the continued viability of Sargeant Marine.[297] Based on the information available in the settlement papers, the DOJ seems to have followed its guidance in reaching this conclusion.

6. Developments Related to Independent Compliance Monitorships

Last year, we highlighted that independent compliance monitors continued to be an important part of both DOJ and SEC resolutions in the wake of then-AAG Benczkowski's 2018 memorandum, which reiterated the important role monitors play in reducing a company's risk of recurring misconduct but focused on the importance of weighing the costs of a monitorship against those potential benefits.[298] In 2020, however, despite a relatively large number of resolutions involving large penalties, none of the year's FCPA resolutions imposed an independent compliance monitor, even where companies had previously settled FCPA charges with the government, instead requiring periodic self-reports regarding remediation and implementation of compliance measures. At the ACI 37th Annual Conference on the FCPA, then-Acting AAG for the Criminal Division, Brian C. Rabbitt, acknowledged that there has been a "downtick" in monitorships.[299] While noting that it is difficult to draw conclusions from the limited sample size, he also highlighted the greater sophistication of companies' compliance personnel and programs nowadays and noted that the

[294] Brian A. Benczkowski, Assistant Attorney General, US Department of Justice, Memorandum on Evaluating a Business Organization's Inability to Pay a Criminal Fine or Criminal Monetary Policy (Oct. 8, 2019), https://www.justice.gov/opa/speech/file/1207576/download.
[295] *See* Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363, ¶¶ 19, 22a (E.D.N.Y. Sept. 22, 2020).
[296] *See* Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363, ¶ 7j (E.D.N.Y. Sept. 22, 2020).
[297] Plea Agreement, *United States v. Sargeant Marine Inc.*, No. 20-CR-363, ¶ 22b (E.D.N.Y. Sept. 22, 2020).
[298] WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 20*20, at 28-29 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.
[299] *FCPA Docket: US Officials on Monitorships, Internal Controls*, GLOBAL INVESTIGATIONS REVIEW (Dec. 4, 2020), https://globalinvestigationsreview.com/just-anti-corruption/fcpa-docket-us-officials-monitorships-internal-controls.

DOJ's guidance and practices make clear that "we are not going to impose monitors for the sake of imposing monitors."[300]

In 2020, several monitorships concluded. Braskem's three-year monitorship, which was imposed as part of settlements with the DOJ and SEC in 2016 as part of its and Odebrecht S.A.'s broader agreement to resolve bribery charges with authorities in Brazil, the United States, and Switzerland, ended in 2020.[301] As part of that broader agreement, Odebrecht—which has since changed its name to Novonor—was also subject to a three-year monitorship through its settlement with the DOJ. That monitorship was set to expire in February 2020 but was extended for approximately nine months and concluded on or around November 2020.[302] Additionally, Embraer's three-year monitorship also concluded, following a 90-day extension, after having been imposed through its 2016 DPA with the DOJ and related settlement with the SEC as part of its global resolution with US and Brazilian authorities to resolve corruption allegations.[303]

As for monitorships currently in place, the COVID-19 pandemic has created practical limitations and apparent challenges for both companies and the monitor teams. Travel restrictions imposed by the pandemic have required remote site-visits, which may not be as effective as in-person visits for a number of reasons. For example, testing and reviewing transactions, shadowing certain functions, and making document collection requests across different time zones are inevitably slower and less effective. Also, in video interviews, language difficulties are more pronounced, building rapport with interviewees is more difficult, and assessing credibility is more challenging.

7. Continued Focus on Gifts, Travel, and Entertainment

US authorities continue to highlight the improper provision of gifts, travel, and entertainment as a means to bribe foreign officials in corporate resolutions brought in 2020. For example, the Airbus resolution, as discussed above, featured the use of foreign travel to influence government officials. The Criminal Information describes that Airbus executives provided "lavish travel and entertainment to foreign officials," including paying for officials at Chinese state-owned entities to travel (on

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[300] FCPA Docket: US Officials on Monitorships, Internal Controls, GLOBAL INVESTIGATIONS REVIEW (Dec. 4, 2020), https://globalinvestigationsreview.com/just-anti-corruption/fcpa-docket-us-officials-monitorships-internal-controls.

[301] US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016); Clare Hudson, *Braskem's US Settlement Comes to a Close after "Very Positive" Monitorship*, GLOBAL INVESTIGATIONS REVIEW (May 20, 2020), https://globalinvestigationsreview.com/just-anti-corruption/braskems-us-settlement-comes-close-after-very-positive-monitorship.

[302] US Department of Justice Press Release No. 16-1515: Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016); Mengqi Sun, *Brazil's Odebrecht Agrees to Extend Monitorship for Another Nine Months*, WALL ST. J. (Feb. 4, 2020), https://www.wsj.com/articles/brazils-odebrecht-agrees-to-extend-monitorship-for-another-nine-months-11580859505#:~:text=Mengqi%20Sun,-Biography&text=Brazilian%20construction%20giant%20Odebrecht%20SA,months%2C%20according%20to%20court%20filings.

[303] Clare Hudson, *After Extension, Embraer Monitorship Ends*, GLOBAL INVESTIGATIONS REVIEW (June 2, 2020), https://globalinvestigationsreview.com/just-anti-corruption/after-extension-embraer-monitorship-ends; US Department of Justice Press Release No. 16-1240: Embraer Agrees to Pay More than $107 Million to Resolve Foreign Corrupt Practices Act Charges (Oct. 24, 2016); Consent of Defendant Embraer, S.A., *SEC v. Embraer, S.A.*, No. 16-CV-62501 (S.D. Fla. Oct. 24, 2016).

occasion with their families) to the United States for "all expense-paid events" in Park City, Utah, and Maui, Hawaii.[304] According to the DOJ, there was very limited business discussion during those trips, with most of the time engaged in leisure and entertainment activities, such as scuba diving, golf, and dinner receptions.[305] The Criminal Information also describes a specialized fund to pay event agencies to host events for Chinse government officials that had "limited business-related content."[306] The events included a golf invitational and leisure travel within China.[307]

As discussed above, the Herbalife papers describe the extensive use of gifts and entertainment to corruptly influence Chinese government officials. Despite the extensive conduct described in the papers, and that the Statement of Facts appended to Herbalife's DPA states that Herbalife "provide[d] corrupt payments and benefits to Chinese government officials," the DOJ limited the charge to conspiracy to violate the books and records provision and the SEC limited its charges to violations of the accounting provisions.[308]

Finally, in a settlement with a European pharmaceutical company and its current and former subsidiaries, the DOJ and the SEC described a scheme in which a company in Europe paid for HCPs at state-owned clinics to attend international conferences, including in the United States, for the purpose of having those providers prescribe one of the company's drugs. According to the government's papers, internal company documents tied the use of international conference sponsorships to efforts to influence those officials. The DOJ referred to this conduct in support of both the anti-bribery and accounting provisions charges.

While all three of these cases involved misconduct in addition to the use of gifts, travel, and entertainment, the attention paid to the provision of these non-cash benefits to government officials and their families indicates that US authorities will continue to pursue FCPA charges centered on that conduct going forward.

B. Notable Features of Individual Resolutions

1. Prosecution of Individuals Has Dropped from Recent Years

In an apparent shift from the DOJ's recent emphasis—both in its policy pronouncements and in the cases the Department brought—on prosecuting individuals,[309] the number of individuals prosecuted in connection with FCPA cases dropped significantly in 2020. Whether because of the COVID-19 global pandemic, more charges than usual remaining under seal due to ongoing investigations, or a change in priorities, the DOJ only brought charges against 21 individuals in

[304] Information, *United States v. Airbus SE*, No. 20-CR-00021, ¶¶ 35, 43 (D.D.C. Jan. 28, 2020).
[305] Information, *United States v. Airbus SE*, No. 20-CR-00021, ¶ 44 (D.D.C. Jan. 28, 2020).
[306] Information, *United States v. Airbus SE*, No. 20-CR-00021, ¶¶ 92-97 (D.D.C. Jan. 28, 2020).
[307] Information, *United States v. Airbus SE*, No. 20-CR-00021, ¶ 96 (D.D.C. Jan. 28, 2020).
[308] Deferred Prosecution Agreement, *United States v. Herbalife Nutrition Ltd.*, No. 20-CR-00443, Attachment A ¶ 13 (S.D.N.Y. Sept. 1, 2020).
[309] *See* Rod J. Rosenstein, Deputy Attorney General, US Department of Justice, Keynote Address on FCPA Enforcement Developments (Mar. 7, 2019), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-keynote-address-fcpa-enforcement.

2020, compared with 39 in both 2019 and 2018. The SEC, which historically has brought far fewer individual enforcement actions than the DOJ, similarly charged half the number of individuals in 2020 than it charged in 2019, with a drop to three individuals charged in 2020 from six in 2019.

2. Individuals Continue to Be Charged in Connection with Several Long-Running Investigations

As has often been the case in recent years, in 2020 individuals continued to be charged years after corporate investigations were opened, and in some instances even years after those corporate inquiries were resolved. In the cases of long-running, cross-jurisdictional investigations into PDVSA and PetroEcuador, for instance, resolutions with individuals have occurred while investigations against their related entities are reportedly ongoing, demonstrating US authorities' commitment to prosecuting individuals most culpable for broader corporate misconduct. Notably, charges were unsealed in 2020 that were originally filed against individuals involved in the Alstom bribery scheme in 2015.

While not a new charge in 2020, Roger Ng—one of the first individuals charged in connection with the ongoing 1MDB bribery scheme—contested charges by filing a motion to dismiss the indictment nearly two years after it was initially filed.[310] The DOJ had charged Ng, a Malaysian investment banker, in 2018 with conspiring to launder money and conspiracy to violate the FCPA.[311] In a memorandum unsealed in November 2020, Ng argued that the indictment should be dismissed for lack of venue[312] and that the FCPA charges should be dismissed because they failed to allege that he conspired to circumvent a set of internal accounting controls.[313] As of January 20, 2021, the Court had not ruled on Ng's motion.

a. Alstom

In 2014, French power and transportation company Alstom S.A. pleaded guilty to violating the FCPA and paid a $772 million criminal penalty—at the time, the largest FCPA penalty ever levied by the US authorities—to resolve charges related to a multinational bribery scheme in which over $75

[310] Memorandum of Law in Support of Defendant Roger Ng's Motion to Dismiss the Indictment and Other Relief, *United States v. Ng Chong Hwa a.k.a Roger Ng*, No. 18-CR-00538 (E.D.N.Y. Oct. 30, 2020) (memorandum unsealed on Nov. 20, 2020).
[311] US Department of Justice Press Release No. 18-1429: Malaysian Financier Low Taek Jho, Also Known As "Jho Low," and Former Banker Ng Chong Hwa, Also Known As "Roger Ng," Indicted for Conspiring to Launder Billions of Dollars in Illegal Proceeds and to Pay Hundreds of Millions of Dollars in Bribes (Nov. 1, 2018); WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 80 (Jan. 17, 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[312] Memorandum of Law in Support of Defendant Roger Ng's Motion to Dismiss the Indictment and Other Relief, *United States v. Ng Chong Hwa a.k.a Roger Ng*, No. 18-CR-00538, § III (E.D.N.Y. Oct. 30, 2020) (memorandum unsealed on Nov. 20, 2020).
[313] Memorandum of Law in Support of Defendant Roger Ng's Motion to Dismiss the Indictment and Other Relief, *United States v. Ng Chong Hwa a.k.a Roger Ng*, No. 18-CR-00538, § IV (E.D.N.Y. Oct. 30, 2020) (memorandum unsealed on Nov. 20, 2020).

million in improper payments were made to government officials in Indonesia, Saudi Arabia, Egypt, Taiwan, and the Bahamas.[314]

In a 2015 grand jury indictment, unsealed five years later in February 2020, the DOJ charged two former executives of Alstom's Indonesian subsidiary and a former executive of Marubeni Corporation, a Japanese trading company, for their alleged involvement in a scheme to pay bribes to foreign government officials in Indonesia.[315] Alstom and its subsidiaries allegedly partnered with Marubeni[316] to secure a contract from Indonesia's state-owned electricity company, Perusahaan Listrik Negara (PLN).[317] The indictments of the three individuals were part of a wide-ranging investigation into Alstom's (and its employees') alleged FCPA violations and bring the total number of individuals charged by the DOJ in connection with the bribery scheme to nine. To date, five of these individuals have either pleaded guilty or been convicted for their involvement in the bribery scheme.[318]

The newly unsealed indictment alleges that Reza Moenaf and Eko Sulianto, respectively the former president and ex-director of sales of Alstom's Indonesian subsidiary, and Junji Kusunoki, former deputy general manager of Marubeni, paid bribes to Indonesian officials in order to secure a $118 million power contract known as the Tarahan project.[319] The DOJ alleges that the three defendants, along with other executives and employees, retained consultants to conceal the bribery scheme.[320] The purported consultants received commissions based on the value of the power contract, which they then provided to Indonesian officials, including a high-ranking member of the Indonesian Parliament and the president of PLN.[321] Moenaf and Sulianto were each charged with one count of conspiracy to violate the FCPA, two counts of violating the FCPA, and one count of money laundering.[322] Kusunoki was charged with one count of conspiracy to violate the FCPA, six counts

[314] US Department of Justice Press Release No. 14-1448: Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014). *See also* Plea Agreement, *United States v. Alstom S.A.*, No. 14-CR-00246 (D. Conn. Dec. 22, 2014).
[315] Superseding Indictment, *United States v. Junji Kusunoki*, *Reza Moenaf, and Eko Sulianto*, No. 13-CR-00212 (D. Conn. Feb. 26, 2015).
[316] In 2014, Marubeni also entered a plea agreement with the DOJ for its involvement in the bribery scheme. *See* US Department of Justice Press Release No. 14-290: Marubeni Corporation Agrees to Plead Guilty to Foreign Bribery Charges and to Pay an $88 Million Fine (Mar. 19, 2014).
[317] Superseding Indictment, *United States v. Junji Kusunoki, Reza Moenaf, and Eko Sulianto*, No. 13-CR-00212, ¶¶ 4-5 (D. Conn. Feb. 26, 2015).
[318] While former Alstom executive Lawrence Hoskins was convicted in November 2019 of one count of conspiracy to violate the FCPA, six counts of violating the FCPA, three counts of money laundering, and one count of conspiracy to launder money following a two-week jury trial, the district judge set aside the FCPA guilty verdicts in February 2020. Ruling on Defendant's Rule 29(c) and Rule 33 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238 (D. Conn. Feb. 26, 2020); WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 40-41 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.
[319] US Department of Justice Press Release No. 20-196: Former Alstom Executives and Marubeni Executive Charged with Bribing Indonesian Officials (Feb. 18, 2020).
[320] Superseding Indictment, *United States v. Junji Kusunoki, Reza Moenaf, and Eko Sulianto*, No. 13-CR-00212, ¶¶ 23-24 (D. Conn. Feb. 26, 2015).
[321] Superseding Indictment, *United States v. Junji Kusunoki, Reza Moenaf, and Eko Sulianto*, No. 13-CR-00212, ¶ 23 (D. Conn. Feb. 26, 2015).
[322] US Department of Justice Press Release No. 20-196: Former Alstom Executives and Marubeni Executive Charged with Bribing Indonesian Officials (Feb. 18, 2020).

of violating the FCPA, and four counts of money laundering.[323] The indictment—which was originally returned by a federal grand jury in 2013 and superseded in 2015—was unsealed a few months after Lawrence Hoskins was convicted in November 2019, likely indicating that the DOJ does not intend to bring charges against any other individuals allegedly involved in the Alstom bribery scheme. As noted above, Hoskins' conviction was overturned by a district court in February 2020.[324]

b. PDVSA

The DOJ continued to prosecute individuals as part of its long-running bribery investigation relating to Venezuela's national oil company, PDVSA.[325] In 2020, the PDVSA investigation resulted in three new guilty pleas and FCPA-related charges against four individuals, bringing the total PDVSA-related charges to over 30 individuals, 21 of whom have since pleaded guilty.[326]

In March 2020, the DOJ charged Carlos Enrique Urbano Fermin and Leonardo Santilli with conspiracy to commit money laundering for agreeing to pay bribes.[327] Urbano Fermin, a Venezuelan citizen, allegedly provided $100,000 in illicit payments to a Venezuelan official in exchange for the official's assistance in preventing Venezuelan authorities from criminally prosecuting his companies for corrupt activities in connection with PDVSA's procurement process.[328] Santilli, a dual Venezuelan-Italian citizen who controlled several companies in Venezuela and Florida, allegedly participated in a scheme wherein his companies brokered the supply of goods to PDVSA subsidiaries for inflated prices and paid kickbacks to the officials who authorized the supply contracts.[329] Santilli's companies allegedly received over $146 million from PDVSA subsidiaries through wire transfers to his companies' Miami accounts.[330] The DOJ alleged that Santilli's companies used less than 30% of the funds, as the remaining funds were transferred to Santilli or his family's personal accounts, shell companies, and various Venezuelan individuals' accounts with no clear connection to Santilli's businesses.[331]

In July 2020, a grand jury returned an indictment against Jose Luis De Jongh Atencio, a former procurement official at Citgo Petroleum Corporation, a Houston-based subsidiary of PDVSA, charging De Jongh with one count of conspiracy to commit money laundering and five counts of

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[323] US Department of Justice Press Release No. 20-196: Former Alstom Executives and Marubeni Executive Charged with Bribing Indonesian Officials (Feb. 18, 2020).
[324] Ruling on Defendant's Rule 29(c) and Rule 33 Motions, *United States v. Lawrence Hoskins*, 12-CR-00238, ¶ 13 (D. Conn. Feb. 26, 2020).
[325] *See* WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 35-36 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.
[326] US Department of Justice Press Release No. 20-754: Former Venezuelan Official Charged in Connection with International Bribery and Money Laundering Scheme (Aug. 6, 2020).
[327] Information, *United States v. Carlos Enrique Urbano Fermin*, No. 20-CR-20163 (S.D. Fla. Mar. 20, 2020); Complaint, *United States v. Leonardo Santilli*, No. 20-MJ-02459-LFL (S.D. Fla. Mar. 20, 2020).
[328] Information, *United States v. Carlos Enrique Urbano Fermin*, No. 20-CR-20163, at 2-5 (S.D. Fla. Mar. 20, 2020).
[329] Criminal Complaint, *United States v. Leonardo Santilli*, No. 20-MJ-02459, ¶¶ 14-17 (S.D. Fla. Mar. 20, 2020).
[330] Criminal Complaint, *United States v. Leonardo Santilli*, No. 20-MJ-02459, ¶ 16 (S.D. Fla. Mar. 20, 2020).
[331] Criminal Complaint, *United States v. Leonardo Santilli*, No. 20-MJ-02459, ¶ 17 (S.D. Fla. Mar. 20, 2020).

money laundering.[332] De Jongh's indictment appears to be the DOJ's first charges in connection with its expansion of the PDVSA investigation into Citgo.[333] De Jongh, a dual US-Venezuelan citizen, allegedly accepted kickbacks from businessmen, including Farias and Testino (discussed above), in exchange for helping secure business advantages from Citgo and PDVSA.[334] The indictment alleges that De Jongh directed the bribe payments to be made to shell companies in Panama and Switzerland and laundered the funds through US bank accounts.[335] According to the indictment, De Jongh largely used the bribe proceeds to purchase real estate in Texas.[336] De Jongh allegedly received over $2.5 million in bribe payments, as well as other items of value, including tickets to the Super Bowl, a World Series Game, and a U2 concert.[337] In December 2020, the grand jury returned a ten count superseding indictment which added one count of conspiracy to violate the Travel Act and three counts of violating the Travel Act.[338]

Finally, In November 2020, the DOJ charged Natalino D'Amato, a dual Venezuelan-Italian citizen, with 11 counts of money laundering offenses related to his involvement in the PDVSA bribery scheme.[339] The indictment alleges that D'Amato, who owned various Venezuelan companies that sold goods to PDVSA subsidiaries, conspired with Venezuelan officials who awarded his company highly inflated contracts in exchange for kickback payments.[340] According to the indictment, D'Amato received over $160 million from PDVSA subsidiary accounts into accounts held by his companies in South Florida, and proceeded to wire bribe payments from a portion of those funds to numerous Venezuelan officials.[341] The indictment specifies the property subject to forfeiture includes the involved bank accounts, with funds totaling over $45 million.[342] The case is ongoing.

The DOJ also obtained guilty pleas from individuals who had been charged in recent years in connection with the PDVSA bribery scheme. In February 2020, Tulio Anibal Farias-Perez—a Venezuelan citizen and Texas resident—pleaded guilty to conspiracy to violate the FCPA.[343] According to the criminal information, Farias and his business partner, Jose Manuel Gonzalez Testino, provided improper benefits to PDVSA officials in order to obtain government contracts and

[332] US Department of Justice Press Release No. 20-754: Former Venezuelan Official Charged in Connection with International Bribery and Money Laundering Scheme (Aug. 6, 2020).
[333] WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 13-14 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.
[334] US Department of Justice Press Release No. 20-754: Former Venezuelan Official Charged in Connection with International Bribery and Money Laundering Scheme (Aug. 6, 2020).
[335] Indictment, *United States v. Jose Luis de Jongh-Atencio*, No. 20-CR-00305, ¶¶ 25-28 (S.D. Tex. Jul. 16, 2020).
[336] Indictment, *United States v. Jose Luis de Jongh-Atencio*, No. 20-CR-00305, ¶¶ 29-32 (S.D. Tex. Jul. 16, 2020).
[337] Indictment, *United States v. Jose Luis de Jongh-Atencio*, No. 20-CR-00305, ¶¶ 33-52 (S.D. Tex. Jul. 16, 2020).
[338] Superseding Indictment, *United States v. Jose Luis de Jongh-Atencio*, No. 20-CR-00305, ¶¶ 69-88 (S.D. Tex. Dec. 16, 2020).
[339] Indictment, *United States v. Natalino D'Amato*, 20-CR-20241 (S.D. Fla. Nov. 24, 2020).
[340] Indictment, *United States v. Natalino D'Amato*, 20-CR-20241, at 5 (S.D. Fla. Nov. 24, 2020).
[341] Indictment, *United States v. Natalino D'Amato*, 20-CR-20241, at 6-7 (S.D. Fla. Nov. 24, 2020).
[342] Indictment, *United States v. Natalino D'Amato*, 20-CR-20241, at 11-12 (S.D. Fla. Nov. 24, 2020).
[343] Farias pleaded guilty on February 19, 2020, but his plea remains under seal by the DOJ. *See* US Department of Justice, *United States v. Tulio Anibal Farias-Perez,* No. 20-CR-00089 (Mar. 6, 2020).

other preferential treatment from PDVSA.[344] Farias jointly controlled the companies used to secure PDVSA business with Gonzalez,[345] who pleaded guilty to FCPA-related charges in May 2019.[346] Farias is scheduled to be sentenced in February 2021.[347]

In August 2020, Lennys Rangel, a former procurement chief of Petrocedeño (a joint venture between PDVSA and two European oil companies), pleaded guilty to conspiracy to commit money laundering in connection with allegations that she received over $5 million in bribes from various contractors seeking to win business with Petrocedeño.[348] Soon thereafter, Edoardo Orsoni, former general counsel for PDVSA and Petrocedeño, also pleaded guilty to conspiracy to commit money laundering in connection with the same alleged bribery scheme.[349] Rangel and Orsoni, who are Venezuelan citizens, used the proceeds from the illicit scheme to purchase real estate in Florida.[350]

(1) Sargeant Marine

A PDVSA-related investigation into Florida-based asphalt company Sargeant Marine (discussed above in further detail[351]) resulted in the company pleading guilty in September 2020 to conspiracy to violate the FCPA related to its conduct in Brazil, Venezuela, and Ecuador.[352] As part of its PDVSA-related conduct, Sargeant Marine admitted that it bribed four PDVSA officials in exchange for their assistance in securing asphalt purchase contracts and inside information.[353] The DOJ recently announced charges against individuals allegedly involved in the Sargeant Marine bribery scheme, including company senior executive and part owner Daniel Sargeant and former PDVSA official Hector Nuñez Troyano.[354] Sargeant pleaded guilty to conspiracy to violate the FCPA and conspiracy to commit money laundering,[355] and Nuñez Troyano pleaded guilty to conspiracy to commit money laundering.[356]

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[344] Information, *United States v. Tulio Anibal Farias-Perez*, No. 20-CR-00089, ¶¶ 14-15 (S.D. Tex. Feb. 7, 2020).
[345] Information, *United States v. Tulio Anibal Farias-Perez*, No. 20-CR-00089, ¶ 3 (S.D. Tex. Feb. 7, 2020).
[346] US Department of Justice Press Release No. 19-593: Business Executive Pleads Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme (May 29, 2019).
[347] Order, *United States v. Tulio Anibal Farias-Perez*, No. 20-CR-00089, ¶ 5 (S.D. Tex. Aug. 5, 2020).
[348] Plea Agreement, *United States v. Lennys Rangel*, No. 19-CR-20726, ¶ 2 (S.D. Fla. Aug. 11, 2020); Information, *United States v. Lennys Rangel*, No. 19-CR-20726, at 3-4 (S.D. Fla. Nov. 4, 2019).
[349] Plea Agreement, *United States v. Edoardo Orsoni*, No. 19-CR-20725, ¶ 2 (S.D. Fla. Aug. 25, 2020); Information, *United States v. Edoardo Orsoni*, No. 19-CR-20725, at 3-5 (S.D. Fla. Nov. 1, 2019).
[350] Information, *United States v. Lennys Rangel*, No. 19-CR-20726, at 2-5 (S.D. Fla. Nov. 1, 2019); Information, *United States v. Edoardo Orsoni*, No. 19-CR-20725, at 2-5 (S.D. Fla. Nov. 1, 2019).
[351] *See supra* at pp. 45-47.
[352] US Department of Justice Press Release No. 20-983: 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 (Sep. 22, 2020).
[353] Plea Agreement, *United States v. Sargeant Marine, Inc.*, No. 20-CR-00363, Attachment A ¶¶ 47-66 (E.D.N.Y. Sep. 21, 2020).
[354] US Department of Justice Press Release No. 20-983: 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).
[355] Criminal Cause for Pleading, *United States v. Daniel Sargeant*, No. 19-CR-00319 (E.D.N.Y. Dec. 18, 2019); Information, *United States v. Daniel Sargeant*, No. 19-CR-00319 (E.D.N.Y. Dec. 18, 2019).
[356] Criminal Cause for Pleading, *United States v. Hector Nuñez Troyano*, No. 19-CR-00135 (E.D.N.Y. Mar. 15, 2019); Information, *United States v. Hector Nuñez Troyano*, No. 19-CR-00135 (E.D.N.Y. Mar. 15, 2019).

Shortly before the Sargeant Marine plea agreement, a federal court in New York unsealed charges against Daniel Comoretto,[357] a Venezuelan national who was formerly a manager at PDVSA between 2010 and 2013 involved with the trading of asphalt.[358] The DOJ alleged that Comoretto, along with Nuñez Troyano (identified in the complaint as "PDVSA Official #1"), agreed to solicit and accept bribes from multiple companies, including Sargeant Marine, to assist those companies in obtaining contracts to purchase asphalt from PDVSA.[359] The DOJ further alleged that Comoretto and Nuñez Troyano concealed the bribe scheme by directing payments to various bank accounts, including Panamanian accounts held by shell companies.[360]

Finally, in December 2020, Brazilian national Jorge Luz and his son, Bruno Luz, were charged for conspiring with others—including Daniel Sargeant—to pay bribes to Petrobras executives and Brazilian politicians on behalf of Sargeant Marine.[361] Over the course of five years, the father and son allegedly facilitated the payment of over $5 million in bribes through shell companies they had created in the Marshall Islands.[362] The DOJ alleged that Sargeant Marine obtained more than $26 million in profits from contracts Jorge and Bruno Luz helped secure through the bribery scheme.[363] Jorge and Bruno Luz were charged as agents of a domestic concern for conspiracy to violate the FCPA[364] and pleaded guilty on December 10, 2020.[365]

c. PetroEcuador

The DOJ has also continued to charge individuals in connection with its investigation into bribery and money laundering at PetroEcuador, Ecuador's state-owned oil company.[366] To date, 13 individuals have pleaded guilty for their roles in facilitating the bribery scheme, including former PetroEcuador officials who received and concealed the bribe payments, and businessmen and contractors who paid the bribes to obtain lucrative contracts from PetroEcuador.[367] In January 2020, Armengol Alfonso Cevallos Diaz—an Ecuadorian citizen and Miami resident—became the

[357] Complaint, *United States v. Daniel Comoretto*, No. 20-MJ-00130 (E.D.N.Y. Sep. 10, 2020).
[358] Complaint, *United States v. Daniel Comoretto*, No. 20-MJ-00130, ¶ 11 (E.D.N.Y. Sep. 10, 2020).
[359] Complaint, *United States v. Daniel Comoretto*, No. 20-MJ-00130, ¶ 16 (E.D.N.Y. Sep. 10, 2020).
[360] Complaint, *United States v. Daniel Comoretto*, No. 20-MJ-00130, ¶¶ 20-23 (E.D.N.Y. Sep. 10, 2020).
[361] Information, *United States v. Jorge Luz*, 20-CR-00559, ¶¶ 14-15 (E.D.N.Y. Dec. 9, 2020); Information, *United States v. Bruno Luz*, 20-CR-00558, ¶¶ 14-15 (E.D.N.Y. Dec. 9, 2020).
[362] Information, *United States v. Jorge Luz*, 20-CR-00559, ¶¶ 14-16 (E.D.N.Y. Dec. 9, 2020); Information, *United States v. Bruno Luz*, 20-CR-00558, ¶¶ 14-16 (E.D.N.Y. Dec. 9, 2020).
[363] Information, *United States v. Jorge Luz*, 20-CR-00559, ¶¶ 14-16 (E.D.N.Y. Dec. 9, 2020); Information, *United States v. Bruno Luz*, 20-CR-00558, ¶¶ 14-16 (E.D.N.Y. Dec. 9, 2020).
[364] Information, *United States v. Jorge Luz*, 20-CR-00559, ¶¶ 3-4 (E.D.N.Y. Dec. 9, 2020); Information, *United States v. Bruno Luz*, 20-CR-00558, ¶¶ 3-4 (E.D.N.Y. Dec. 9, 2020).
[365] Minute Entry: Plea Agreement Hearing as to Jorge Luz, *United States v. Jorge Luz*, 20-CR-00559 (E.D.N.Y. Dec. 10, 2020); Minute Entry: Plea Agreement Hearing as to Bruno Luz, *United States v. Bruno Luz*, 20-CR-00558 (E.D.N.Y. Dec. 10, 2020).
[366] US Department of Justice Press Release No. 20-75: Miami-Based Businessman Pleads Guilty to FCPA and Money Laundering Violations in Scheme Involving PetroEcuador Officials (Jan. 23, 2020); *see also* WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 35-36 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.
[367] US Department of Justice Press Release No. 20-75: Miami-Based Businessman Pleads Guilty to FCPA and Money Laundering Violations in Scheme Involving PetroEcuador Officials (Jan. 23, 2020).

thirteenth individual to plead guilty to conspiracy to violate the FCPA and conspiracy to commit money laundering.[368]

In August 2019, Cevallos' co-defendant, Jose Melquiades Cisneros Alarcon, pleaded guilty to one count of conspiracy to launder money in connection with the bribery scheme.[369] Cevallos admitted to conspiring with others to funnel $4.4 million in bribes to PetroEcuador officials in order to secure business.[370] Cevallos further admitted to concealing the bribery scheme by laundering funds through Miami-based shell companies and bank accounts, and by using the bribe payments to purchase real estate in the Miami area for the benefit of PetroEcuador officials.[371]

In September 2020, a federal grand jury in the Eastern District of New York returned an indictment against Javier Aguilar, a former Vitol Group manager who was accused of paying $870,000 in bribes to PetroEcuador employees.[372] Aguilar allegedly covered up the bribery payments with sham intermediary consulting agreements and invoices.[373] The indictment charged him with one count of conspiracy to violate the FCPA and one count of conspiracy to commit money laundering.[374]

d. Seguros Sucre

In March 2020, the DOJ unsealed FCPA-related money laundering charges against individuals involved in a bribery scheme with Ecuador's state-owned insurance company, Seguros Sucre S.A.[375] The DOJ alleged that Juan Ribas Domenech, the Chairman of Seguros Sucre, accepted bribes in exchange for awarding insurance contracts to UK-based insurance company, Jardine Lloyd Thompson (JLT). In 2014, JLT executive Felipe Moncaleano Botero allegedly approached Jose Vincente Gomez Aviles and Roberto Heinert, owners of an intermediary company that received commissions for helping companies retain contracts with Seguros Sucre, to assist with the retention and renewal of a reinsurance contract for Ecuador's Ministry of Defense (MOD).[376] According to the charging documents, JLT secured the renewal of the MOD insurance policy after Moncaleano, Gomez, and Heinert arranged a series of meetings with Seguros Sucre officials, including Ribas, involved in contract award decisions.[377] Following the contract renewal, JLT

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[368] Indictment, *United States v. Armengol Alfonso Cevallos Diaz and Jose Melquiades Cisneros Alarcon*, No. 19-CR-20284, at 4-10 (S.D. Fla. May 9, 2019); Plea Agreement, *United States v. Armengol Alfonso Cevallos Diaz*, No. 19-CR-20284, ¶ 1 (S.D. Fla. Jan. 24, 2020).
[369] Plea Agreement, *United States v. Jose Melquiades Cisneros Alarcon*, No. 19-CR-20284, ¶ 1 (S.D. Fla. Aug. 19, 2019).
[370] US Department of Justice Press Release No. 20-75: Miami-Based Businessman Pleads Guilty to FCPA and Money Laundering Violations in Scheme Involving PetroEcuador Officials (Jan. 23, 2020).
[371] US Department of Justice Press Release No. 20-75: Miami-Based Businessman Pleads Guilty to FCPA and Money Laundering Violations in Scheme Involving PetroEcuador Officials (Jan. 23, 2020).
[372] US Department of Justice Press Release: Former Manager of Oil Trading Firm Charged in Money Laundering and Bribery Scheme (Sep. 22, 2020).
[373] Complaint, *United States v. Javier Aguilar*, No. 20-CR-00390, ¶¶ 24-26 (E.D.N.Y. Jul. 10, 2020).
[374] Indictment, *United States v. Javier Aguilar*, No. 20-CR-00390, ¶¶ 1, 3 (E.D.N.Y. Sep. 22, 2020).
[375] Clara Hudson, *DOJ Unravels Bribery Scheme at Ecuadorian State Insurer*, GLOBAL INVESTIGATIONS REVIEW (Apr. 9, 2020), https://globalinvestigationsreview.com/just-anti-corruption/doj-unravels-bribery-scheme-ecuadorian-state-insurer.
[376] Criminal Complaint, *United States v. Juan Ribas Domenech, Jose Vincente Gomez Aviles, and Felipe Moncaleano Botero*, No. 20-MJ-022280, ¶ 24 (S.D. Fla. Feb. 13, 2020).
[377] Criminal Complaint, *United States v. Juan Ribas Domenech, Jose Vincente Gomez Aviles, and Felipe Moncaleano Botero*, No. 20-MJ-022280, ¶¶ 24-25 (S.D. Fla. Feb. 13, 2020).

reached an agreement whereby Gomez and Heinert's company would receive a commission of $1.8 million on the 2013 to 2014 contract, and an 8% commission on the 2014 to 2015 contract.[378] The purported commission payments, however, were not made to the intermediary's Panama bank account, but instead, payments totaling approximately $10.8 million were made to accounts in the United States, Panama, and Switzerland, held in the name of various corporate entities.[379]

Ribas,[380] Gomez,[381] Moncaleano,[382] and Heinert[383] all separately pleaded guilty to conspiracy to commit money laundering.

3. Expansive Use of Agency Theory—Asante Berko

The SEC continues to use aggressive agency theories to bring FCPA charges against individual defendants who might not otherwise fall within the jurisdiction of the statute. In doing so, the SEC appears to be building off the DOJ's growing reliance on agency theory, which is discussed below in further detail.[384]

In April 2020, the SEC charged Asante Berko, a former executive of a UK-based subsidiary of a publicly traded bank holding company in the United States, with violating the anti-bribery provision of the FCPA for his alleged involvement in a bribery scheme to help a firm client win a government contract in the Republic of Ghana.[385] Berko, a dual US-Ghanaian citizen, was not an employee of the US bank holding company.[386] The SEC alleged, however, that Berko was an agent of the US issuer because (1) he was subject to policies of the US company, including its anti-bribery and anti-corruption policies; (2) the US company had significant control over Berko's work, even though he was an employee of the foreign subsidiary; and (3) Berko acted on behalf of the US company, for example, by creating a memorandum he knew would be provided to New York based members of the US company.[387]

The SEC further alleged that Berko took steps to circumvent the US company's controls, such as trying to conceal the bribery scheme from the legal and compliance personnel at both the subsidiary and the US company.[388] This allegation, which suggests that Berko was not authorized to engage in bribery on behalf of his former employer, seems to run counter to a finding of agency,

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[378] Criminal Complaint, *United States v. Juan Ribas Domenech, Jose Vincente Gomez Aviles, and Felipe Moncaleano Botero*, No. 20-MJ-022280, ¶ 26 (S.D. Fla. Feb. 13, 2020); Criminal Complaint, *United States v. Roberto Heinert*, No. 20-CR-20187, ¶ 27 (S.D. Fla. Mar. 4, 2020).
[379] Criminal Complaint, *United States v. Juan Ribas Domenech, Jose Vincente Gomez Aviles, and Felipe Moncaleano Botero*, No. 20-MJ-022280 (S.D. Fla. Feb. 13, 2020); Criminal Complaint, *United States v. Roberto Heinert*, No. 20-CR-20187, ¶ 28 (S.D. Fla. Mar. 4, 2020).
[380] Plea Agreement, *United States v. Juan Ribas Domenech*, No. 20-CR-20179 (S.D. Fla. Sep. 16, 2020).
[381] Plea Agreement, *United States v. Jose Vincente Gomez Aviles*, No. 20-CR-20169 (S.D. Fla. Jun. 11, 2020).
[382] Plea Agreement, *United States v. Felipe Moncaleano Botero*, No. 20-CR-20175 (S.D. Fla. Aug. 4, 2020).
[383] Preliminary Order of Forfeiture, *United States v. Roberto Heinert*, No. 20-CR-20187, at 1 (S.D. Fla. Oct. 29, 2020).
[384] *See infra* at pp. 70-73.
[385] Complaint, *SEC v. Asante Berko*, No. 20-CV-01789, ¶ 1 (E.D.N.Y. Apr. 13, 2020).
[386] Complaint, *SEC v. Asante Berko*, No. 20-CV-01789, ¶ 16 (E.D.N.Y. Apr. 13, 2020).
[387] Complaint, *SEC v. Asante Berko*, No. 20-CV-01789, ¶¶ 35-39 (E.D.N.Y. Apr. 13, 2020).
[388] Complaint, *SEC v. Asante Berko*, No. 20-CV-01789, ¶¶ 76-80 (E.D.N.Y. Apr. 13, 2020).

which requires authorization, direction, and control.[389] Essentially, the SEC simultaneously claimed that Berko was an agent of the US company, but also that he had no authority to act on the US company's behalf. Notably, when the SEC announced the charges against Berko, Charles Cain, Chief of the SEC's FCPA Unit, highlighted that the "firm's compliance personnel took appropriate steps to prevent the firm from participating in the transaction and it is not being charged," an unusual statement coming from SEC personnel.[390] Also of note, no corresponding DOJ case against Berko has been filed (or if one has been filed, it has not yet been unsealed).

The SEC's decision to use an expansive agency theory in this case is in line with how the DOJ used an agency theory in an August 2017 indictment against Daisy Teresa Rafoi-Bleuler, a Swiss citizen.[391] Rafoi-Bleuler, an asset manager at Eagle Wealth Management AG, a Swiss company, was involved in bribery charges relating to the PDVSA investigation. Rafoi-Bleuler was not a US citizen, did not participate in activities on US soil, and was arrested overseas in July 2019. The DOJ nonetheless alleged that Rafoi-Bleuler acted as an agent of US companies and their employees because she assisted the US companies with setting up Swiss bank accounts and disbursed funds for US companies between different Swiss bank accounts.[392] In October 2020, Rafoi-Bleuler filed a motion to dismiss the charges, arguing that the indictment "continues the worrisome trend by the Department of Justice to stretch the reach of the United States' criminal statutes beyond Congress' intent in an attempt to police the world."[393]

4. Former Foreign Officials and Their Family Members Continue to Face Non-FCPA Charges in FCPA Enforcement Actions

The DOJ brought or resolved actions against eight former foreign governmental officials or their family members in 2020 (a slight increase from the seven DOJ brought or resolved in 2019[394]). None of the 2020 defendants were charged with FCPA offenses because, unlike other bribery statutes (such as the UK Bribery Act), the FCPA does not prohibit the acceptance of bribes. Thus,

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[389] Because the FCPA does not define agency, courts look to other sources, such as the Restatement of Agency, to determine whether an agency relationship exists. *See Cmty. for Creative Non-Violence v. Reid,* 490 U.S. 730, 739 (1989) (It is "well established that where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms"); *Christiana Trust v. Riddle,* 911 F.3d 799, 803 (5th Cir. 2018) ("To determine whether an agency relationship exists, the Supreme Court looks to the Restatement of Agency.") (citing *Meyer v. Holley*, 537 U.S. 280, 286 (2003)). The Restatement (Third) of Agency § 1.01 cmt. (f)(1) (Am. L. Inst. 2006) requires both the principal's control over the agent and both parties' consent to the agent's acting on the principal's behalf.

[390] US Securities and Exchange Commission Press Release No. 2020-88: SEC Charges Former Financial Service Executive With FCPA Violations (Apr. 13, 2020).

[391] US Department of Justice, Criminal Division, Fraud Section*, Year in Review 2019*, at 15 (2019), https://www.justice.gov/criminal-fraud/file/1245236/download.

[392] Superseding Indictment, *United States v. Nervis G. Villalobos-Cardenas, Alejandro Isturiz-Chiesa, Rafael E. Reiter-Munoz, Javier Alvarado-Ochoa, Daisy T. Rafoi-Bleuler, and Paulo J.D.C. Casqueiro-Murta* , 17-CR-00514, ¶¶ 79, 147-148 (S.D. Tex. Apr. 24, 2019).

[393] Opposed Motion to Dismiss, *United States v. Nervis G. Villalobos-Cardenas, Alejandro Isturiz-Chiesa, Rafael E. Reiter-Munoz, Javier Alvarado-Ochoa, Daisy T. Rafoi-Bleuler, and Paulo J.D.C. Casqueiro-Murta*, 17-CR-00514, at 1 (S.D. Tex. Oct. 27, 2020).

[394] WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 37-39 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.

foreign officials who allegedly accepted bribes are often charged under other criminal statutes, such as money laundering or wire fraud.

a. Panama

In July 2020, the DOJ unsealed charges from the previous month against Luis Martinelli Linares and Ricardo Martinelli Linares, sons of Panama's former president, for their alleged roles as intermediaries in the Odebrecht bribery scheme.[395] The complaint provided that the Linares brothers served as intermediaries for bribe payments and the provision of other things of value to a government official in Panama, and that the brothers opened secret offshore bank accounts to receive, disguise, and transfer the alleged bribes.[396] The DOJ further alleged that approximately $28 million was transferred through the offshore bank accounts for the purpose of benefiting the government official in Panama, and that some of the bribe payments were transferred through corresponding US bank accounts.[397] The DOJ charged both individuals with conspiracy to commit money laundering.[398]

b. The Gambia

The DOJ continues to bring cases seeking civil forfeiture of property, such as purchased real estate, which was acquired using funds obtained through corrupt payments and bribes abroad. In 2020, the DOJ filed a complaint against Yahya Jammeh, former president of The Gambia, in July 2020, seeking the civil forfeiture of property in Maryland.[399] Specifically, the complaint sought forfeiture of a multimillion dollar residence in Potomac, Maryland, that Jammeh allegedly acquired with over $3.5 million in corrupt proceeds through a trust set up by his wife.[400]

c. Venezuela

As was the case in 2019, Venezuela remained a target for efforts by the DOJ to bring charges against foreign officials. In addition to the charges brought against former foreign officials from PDVSA subsidiaries—Lennys Rangel and Edoardo Orsoni from Petrocedeño[401] and Jose Luis De Jongh Atencio from Citgo[402] (discussed above)—in October 2020, the DOJ filed charges against

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[395] US Department of Justice Press Release No. 20-625: Two Defendants Charged for Their Role in Bribery and Money Laundering Scheme Involving Former High-Ranking Government Official in Panama (July 6, 2020).
[396] Amended Complaint, *United States v. Luis Enrique Martinelli Linares and Ricardo Alberto Martinelli Linares*, No. 20-MJ-00498, ¶¶ 27-29 (E.D.N.Y. July 20, 2020).
[397] Amended Complaint, *United States v. Luis Enrique Martinelli Linares and Ricardo Alberto Martinelli Linares*, No. 20-MJ-00498, ¶¶ 31-33 (E.D.N.Y. July 20, 2020).
[398] Amended Complaint, *United States v. Luis Enrique Martinelli Linares and Ricardo Alberto Martinelli Linares*, No. 20-MJ-00498 (E.D.N.Y. July 20, 2020).
[399] Complaint, *United States v. Real Property Located in Potomac Maryland*, No. 20-CV-02071 (D. Md. July 15, 2020).
[400] Complaint, *United States v. Real Property Located in Potomac Maryland*, No. 20-CV-02071 (D. Md. July 15, 2020).
[401] Information, *United States v. Lennys Rangel*, No. 19-CR-20726, ¶ 2 (S.D. Fla. Nov. 1, 2019); Information, *United States v. Edoardo Orsoni*, No. 19-CR-20725, ¶ 2 (S.D. Fla. Nov. 1, 2019).
[402] Information, *United States v. Jose Luis De Jongh Atencio*, No. 20-CR-00305, ¶ 2 (S.D. Tex. July 16, 2020). The charges against De Jongh Atencio also highlight the fact that, under the FCPA, a person living in Texas and running a Texas-based company can still be a "foreign official" if that company is owned by a foreign government entity.

Claudia Diaz, Hugo Chavez's former nurse who was elevated to National Treasurer of Venezuela in 2011 and served in that position until 2013.[403] Diaz and her husband were charged with conspiracy to commit money laundering and money laundering in connection with bribes paid by Venezuelan media-magnate Raul Gorrin Belisario.[404] Gorrin allegedly used these bribes to secure access to Venezuela's currency exchange system, obtaining foreign currency at low rates which he could then resell for a profit on the black market.[405] This was not the first time that the DOJ brought a case in regards to Gorrin's manipulation of the Venezuelan currency market. In 2018, Venezuela's former National Treasurer Alejandro Andrade pleaded guilty to accepting bribes from Gorrin in exchange for granting him Venezuelan bolivars for US dollars at the lower, government rate.[406] Gorrin was indicted for the same conduct.[407]

d. Barbados

Of the eight actions brought against foreign officials and their families in 2020, the only one that was resolved was against Donville Inniss, a former Barbados Member of Parliament and Minister of Industry, International Business, Commerce, and Small Business Development, who was found guilty after a jury trial of two counts of money laundering and one count of conspiracy to commit money laundering.[408] Inniss allegedly obtained the bribes from the Insurance Corporation of Barbados to help secure contracts to insure approximately $100 million worth of government property, and then he laundered the bribes through a dental office in Elmont, New York.[409] While the trial lasted one week, the jury only took two hours of deliberation to reach its decision.[410]

5. Sentencing Trends

Thirteen individuals were sentenced in FCPA or foreign bribery-related cases in 2020, a slight decrease from the 17 individuals who were sentenced in 2019. While most of the defendants received relatively lenient sentences (e.g., time served or supervised release) as a result of their ongoing cooperation with the government's investigations, a few defendants were sentenced to four to six years in prison. Defendants also faced monetary consequences in the form of fines and/or forfeitures. Fines imposed ranged from $5,000 to approximately $130,000, while orders of forfeiture and/or restitution ranged from $150,000 to $4.4 million. The vast majority of these individuals had previously pleaded guilty or been convicted of criminal charges in connection with

[403] Information, *United States v. Claudia Patricia Diaz Guillen and Adrian Jose Velasquez Figueroa*, No. 20-CR-20217, ¶ 1 (S.D. Fla. Oct. 30, 2020).
[404] Information, *United States v. Claudia Patricia Diaz Guillen and Adrian Jose Velasquez Figueroa*, No. 20-CR-20217, ¶ 9 (S.D. Fla. Oct. 30, 2020).
[405] Joshua Goodman, *Hugo Chavez's Ex-Nurse Indicted in US for Money Laundering*, ASSOCIATED PRESS (Oct. 31, 2020), https://apnews.com/article/media-money-laundering-latin-america-hugo-chavez-colombia-5829846ecdc0dd6c6a4e65a24259e805.
[406] Plea Agreement, *United States v. Alejandro Andrade Cedeno*, No. 17-CR-80242, ¶ 7 (S. D. Fla. Jan. 4, 2018).
[407] Indictment, *United States v. Raul Gorrin Belisario*, No. 18-CR-80160, ¶¶ 10-12 (S.D. Fla Aug. 17, 2018).
[408] US Department of Justice Press Release No. 20-52: Former Member of Barbados Parliament and Minister of Industry Found Guilty of Receiving and Laundering Bribes from Barbadian Insurance Company (Jan. 16, 2020).
[409] US Department of Justice Press Release No. 20-52: Former Member of Barbados Parliament and Minister of Industry Found Guilty of Receiving and Laundering Bribes from Barbadian Insurance Company (Jan. 16, 2020).
[410] US Department of Justice Press Release No. 20-52: Former Member of Barbados Parliament and Minister of Industry Found Guilty of Receiving and Laundering Bribes from Barbadian Insurance Company (Jan. 16, 2020).

bribery schemes that also resulted in large corporate FCPA settlements—Alstom (four individuals) and Siemens AG (two individuals)—or large-scale, multi-year investigations into PDVSA (two individuals), PetroEcuador (two individuals), and the Fédération Internationale de Football Association (FIFA) (two individuals).

a. Alstom

Former Alstom employees Larry Puckett, Edward Thiessen, David Rothschild, and Lawrence Hoskins were sentenced for their participation in the alleged bribery scheme to secure a power plant project in Indonesia.[411] Puckett,[412] Thiessen,[413] and Rothschild[414] all pleaded guilty to conspiracy to violate the FCPA. Both Puckett and Thiessen were sentenced to time served and received minor fines based on their minimal participation in the scheme.[415] Prosecutors similarly recommended lenient sentencing for Rothschild, highlighting his multi-year cooperation with the government since pleading guilty in November 2012.[416] In particular, the DOJ noted that, by being the first to enter a plea agreement, Rothschild played a "critical role" in the government's ability to bring charges against and secure guilty pleas from Alstom (which resolved charges in December 2014), as well as other individuals involved in the alleged misconduct, including Thiessen and Puckett.[417] Rothschild also testified at Hoskins' trial.[418]

As discussed below in further detail,[419] Hoskins, who refused to plead guilty and went to trial, was also sentenced in 2020 in connection with the Alstom bribery investigation. Although Hoskins was acquitted of six counts of violating the FCPA, he was sentenced to 15 months in prison and ordered to pay a $30,000 fine for the money laundering convictions.[420] Both the DOJ and Hoskins are appealing the judgment.

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[411] US Department of Justice Press Release No. 11-1626: Eight Former Senior Executives and Agents of Siemens Charged in Alleged $100 Million Foreign Bribe Scheme (Dec. 13, 2011).
[412] Plea Agreement, *United States v. Larry Puckett*, No. 19-CR-00150 (D. Conn. Jun. 10, 2019).
[413] Plea Agreement, *United States v. Edward Thiessen*, No. 19-CR-00181 (D. Conn. Jul. 10, 2019).
[414] Plea Agreement, *United States v. David Rothschild*, No. 12-CR-00223 (D. Conn. Nov. 2, 2012).
[415] Puckett was sentenced to time served and two years of supervised release in addition to being ordered to perform 100 hours of community service and pay a $5,000 fine. *See* Judgment, *United States v. Larry Puckett*, No. 19-CR-00150, at 1 (D. Conn. Apr. 24, 2020); Transcript of Sentencing, *United States v. Larry Puckett*, No. 19-CR-00150, at 16-18 (D. Conn. May 4, 2020). Thiessen was sentenced to time served and ordered to pay $15,000, in addition to being credited for testifying at Hoskins' trial and pointing the government to an "incriminating" 2003 email to Hoskins in which consultants were evaluated based on their relationships to Indonesian government officials. *See* Judgment, *United States v. Edward Thiessen*, No. 19-CR-00181, at 1 (D. Conn. Jul. 20, 2020); Transcript of Sentencing, *United States v. Edward Thiessen*, No. 19-CR-00181, at 10-16 (D. Conn. Jul. 31, 2020).
[416] Motion for Downward Departure, *United States v. David Rothschild*, No. 12-CR-00223, at 5-6, 8 (D. Conn. May 26, 2020). Rothschild was sentenced to time served plus one year of supervised release and ordered to pay $10,000. Judgment, *United States v. David Rothschild*, No. 12-CR-00223, at 1 (D. Conn. Aug. 4, 2020).
[417] Motion for Downward Departure, *United States v. David Rothschild*, No. 12-CR-00223, at 5-6, 8 (D. Conn. May 26, 2020).
[418] Motion for Downward Departure, *United States v. David Rothschild*, No. 12-CR-00223, at 5 (D. Conn. May 26, 2020).
[419] *See infra* at pp. 70-73.
[420] Judgment, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 1 (D. Conn. Mar. 11, 2020).

b. Siemens

Former Siemens executives Andres Truppel and Eberhard Reichert were sentenced in March 2020 and April 2020, respectively, to time served for their roles in a massive bribery scheme in which Argentinian government officials were provided over $100 million in illicit payments in exchange for awarding a $1 billion contract to Siemens.[421] Truppel and Reichert pleaded guilty in September 2015 and March 2018, respectively, to one count of conspiring to violate the FCPA and to commit wire fraud.[422] In their respective sentencing hearings, a New York district court credited Truppel and Reichert's cooperation with the government's investigation.[423]

c. PDVSA

Two more individuals were sentenced in 2020 in connection with the ongoing PDVSA investigation and received stricter sentences relative to other individuals sentenced in 2020. Former PDSA official Alfonzo Eliezer Gravina Munoz was sentenced to 70 months in prison followed by three years of supervised release. Gravina Munoz was also ordered to forfeit $590,446 and pay restitution to the IRS in the amount of $214,847.[424] Florida businessman Juan Jose Hernandez-Comerma was sentenced to 48 months in prison followed by three years of supervised release. He was also ordered to pay a fine of $127,000 and forfeit $3 million.[425]

d. PetroEcuador

Jose Melquiades Cisneros Alarcon and former PetroEcuador official Roberto Barrera, both of whom pleaded guilty in 2019 to FCPA-related money laundering charges, were sentenced to 20 months and 23 months in prison, respectively, followed by three years of supervised release.[426] The district court judge also ordered Cisneros to forfeit $4.4 million[427] and Barrera to forfeit $150,000.[428]

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[421] Information, *United States v. Uriel Sharef*, No. 11-CR-01056 (S.D.N.Y. Dec. 12, 2011); Judgment, *United States v. Andres Truppel*, No. 11-CR-01056 (S.D.N.Y. Mar. 13, 2020); Judgment, *United States v. Eberhard Reichert*, No. 11-CR-01056 (S.D.N.Y. Apr. 28, 2020).
[422] US Department of Justice Press Release No. 15-253: Former Siemens Chief Financial Officer Pleads Guilty In Manhattan Federal Court To $100 Million Foreign Bribery Scheme (Sep. 30, 2015); Plea Agreement, *United States v. Eberhard Reichert*, No. 11-CR-01056 (S.D.N.Y. Mar. 12, 2018).
[423] Transcript of Sentencing, *United States v. Andres Truppel*, No. 11-CR-01056, at 21-22 (S.D.N.Y. Apr. 17, 2020); Transcript of Sentencing, *United States v. Eberhard Reichert*, No. 19-CR-00150, at 7, 10 (S.D.N.Y. Apr. 27, 2020).
[424] Judgment, *United States v. Alfonzo Eliezer Gravina Munoz*, No. 15-CR-00637 (S.D. Tex. Mar. 2, 2020); Final Order of Forfeiture, *United States v. Alfonzo Eliezer Gravina Munoz*, No. 15-CR-00637 (S.D. Tex. May 17, 2017); Information, *United States v. Alfonzo Eliezer Gravina Munoz*, No. 15-CR-00637 (S.D. Tex. Nov. 27, 2015).
[425] Judgment, *United States v. Juan Jose Hernandez-Comerma*, No. 17-CR-00005 (S.D. Tex. Jan. 15, 2020); Order Imposing Money Judgment, *United States v. Juan Jose Hernandez-Comerma*, No. 17-CR-00005 (S.D. Tex. Jan. 8, 2020).
[426] Judgment, *United States v. Jose Melquiades Cisneros Alarcon*, No. 19-CR-20284, at 2, 5 (S.D. Fla. Feb. 19, 2020). Judgment, *United States v. Roberto Barrera*, No. 19-CR-20580 (S.D. Fla. Mar. 6, 2020).
[427] Order of Forfeiture, *United States v. Jose Melquiades Cisneros Alarcon*, No. 19-CR-20284 (S.D. Fla. Feb. 20, 2020).
[428] Preliminary Order of Forfeiture, *United States v. Roberto Barrera*, No. 19-CR-20580 (S.D. Fla. Feb. 28, 2020).

e. FIFA

Two individuals involved in the ongoing FIFA bribery investigation were sentenced in 2020. Former FIFA vice president Alfredo Hawit was sentenced to two years of supervised release, ordered to forfeit $950,000, and barred from serving in an official role in any professional soccer organization while under supervision.[429] Hawit had previously pleaded guilty in 2016 to one count of racketeering conspiracy, two counts of wire fraud conspiracy, and one count of conspiracy to obstruct justice.[430] Former banker Jorge Luiz Arzuaga was also sentenced to three years' probation and ordered to forfeit over $1 million in connection with his role in facilitating bribe payments to various officials at FIFA and other soccer federations.[431] Arzuaga had previously pleaded guilty to one count of money laundering in 2017.[432] Sentencings of other individuals in the FIFA matter remain pending, presumably in part because there is at least one more criminal trial scheduled for 2021 which may require testimony from cooperating defendants.

f. Mark Lambert

In October 2020, Mark Lambert, who in November 2019 was convicted of several charges in connection with bribes paid to a Russian official in exchange for contracts with TENEX, a subsidiary of Russia's State Atomic Energy Corporation, to deliver nuclear materials to customers in the United States and abroad.[433] Lambert is a US citizen and former owner and co-president of the company (Transport Logistics Inc.) that engaged in the bribery payments.[434] Lambert was sentenced to 48 months in prison and a $20,000 fine.

C. Declinations and Case Closures

There were significantly fewer public case closures in 2020 than in some previous years, with only six publicly announced case closures (as compared to nine in 2019 and 17 in 2018), and just one public declination under the DOJ's FCPA CEP (down from two in 2019 and four in 2018).[435]

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[429] Judgment, *United States v. Alfredo Hawit*, No. 15-CR-00252 (E.D.N.Y. Jun. 30, 2020); Order of Forfeiture, *United States v. Alfredo Hawit*, No. 15-CR-00252 (E.D.N.Y. Jun. 30, 2020).
[430] Judgment, *United States v. Alfredo Hawit*, No. 15-CR-00252 (E.D.N.Y. Jun. 30, 2020).
[431] Judgment, *United States v. Jorge Luis Arzuaga*, No. 17-CR-00313 (E.D.N.Y. Nov. 17, 2020); Order of Forfeiture, *United States v. Jorge Luis Arzuaga*, No. 17-CR-00313, at 1 (E.D.N.Y. Jun. 15, 2017).
[432] US Department of Justice Press Release: Former Managing Director At Swiss Bank Pleads Guilty To Money Laundering Charge In Connection With Soccer Bribery Scheme (Jun. 15, 2017).
[433] Verdict Form, *United States v. Mark Lambert*, No. 18-CR-00012, at 2-3 (D. Md. Nov. 22, 2019).
[434] Indictment, *United States, v. Mark T. Lambert*, No. 18-CR-00012, at ¶ 2 (D. Md. Jan. 10, 2018).
[435] For purposes of this publication, instances in which both the DOJ and SEC closed investigations into the same company were counted as a single public case closure. Public declinations under the DOJ FCPA CEP were not included within the total count of public case closures. For clarity, "case closures" are cases that the DOJ determines not to bring charges without saying whether that determination was due to lack of evidence or some other discretionary factor. "Declinations," under the DOJ's CEP, are cases where the DOJ believes there was a sufficient basis to bring a criminal case but chose to decline to do so based on the factors in the CEP.

1. 2020 FCPA Corporate Enforcement Policy Declination

As explained above, the DOJ issued just one public declination under the FCPA CEP in 2020 to World Acceptance Corporation, a small-loan consumer finance business.[436] In the declination letter, the DOJ explained that it would not bring charges despite the Department's conclusion that employees of World Acceptance and its subsidiaries had engaged in bribery in Mexico.[437] The DOJ attributed its decision to, among other things: (1) the company's prompt and voluntary disclosure, (2) the company's "full and proactive" cooperation with the DOJ, (3) the nature and seriousness of the offense, (4) the company's comprehensive remediation, including additional FCPA training, separation from executives in leadership positions while the misconduct took place, and terminating relationships with third parties involved in the misconduct, and (5) the company's agreement to disgorge all ill-gotten gains to the SEC.[438] Specifically, on the same day the DOJ issued its declination letter, World Acceptance agreed to pay approximately $21.7 million in disgorgement, prejudgment interest, and civil penalties to the SEC to resolve charges that the company violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA,[439] reinforcing a key feature of the DOJ's CEP: despite escaping criminal charges, companies that receive a declination letter from the DOJ must still pay all disgorgement, forfeiture, and/or restitution stemming from the misconduct.[440] It is worth noting that the payments described in the DOJ letter included payments to union officials.[441] While the letter does not expressly say whether the DOJ viewed the union officials as "foreign officials" under the FCPA's anti-bribery provisions, union officials can raise potential anti-bribery issues in countries in Latin America and elsewhere, and the case is a good reminder to analyze interactions with such officials carefully.

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[436] US Department of Justice, Declinations (updated Aug. 6, 2020), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations.
[437] Letter from Robert Zink, US Department of Justice, to Mark E. Schamel, Robert R. Ambler and James E. Connelly, Womble Bond Dickinson LLP (Counsel for World Acceptance Corporation) (Aug. 5, 2020), https://www.justice.gov/criminal-fraud/file/1301826/download. Specifically, the letter noted that the DOJ had "found evidence that beginning in 2010 and continuing through 2017, World's Mexican subsidiary, through its employees and agents, paid over $4,000,000 to third-party intermediaries that was used, in part, to pay bribes to Mexican union officials and state government officials in order to obtain contracts with Mexican unions and Mexican state governments that allowed World to make loans to union members and to receive payments on such loans directly from the unions, which withheld the amount of the loan repayment from the paychecks of the union members."
[438] Letter from Robert Zink, US Department of Justice, to Mark E. Schamel, Robert R. Ambler and James E. Connelly, Womble Bond Dickinson LLP (Counsel for World Acceptance Corporation) (Aug. 5, 2020), https://www.justice.gov/criminal-fraud/file/1301826/download.
[439] Order Instituting Cease-and-Desist Proceedings, *In the Matter of World Acceptance Corporation*, Rel. No. 89489, File No. 3-19905 (Aug. 6, 2020).
[440] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[441] US Department of Justice, Declinations (updated Aug. 6, 2020), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations.

2. Public Case Closures

In 2020, there were six public reports of investigation closures, three less than in 2019. This marked the second year in a row with significantly fewer public closures than the 17 reported in 2018.[442]

Notably, these closures included the end of the DOJ Fraud Section's inquiry into Uber Technologies Inc.'s Asian operations.[443] The DOJ's decision to close the Uber investigation may relate at least in part to the company's revamp of its compliance program and its reported cooperation with the government, factors emphasized in the DOJ's FCPA CEP.[444]

In a swift decision, the DOJ and SEC also ended their investigations into Rockwell Collins (Rockwell) which had been acquired by United Technologies Corporation in November 2018.[445] Prior to that acquisition, Rockwell had voluntarily disclosed to the DOJ and SEC that it was conducting an internal investigation regarding meal, entertainment, and gift expenditures by sales employees of B/E Aerospace (a company Rockwell had recently acquired) that may not have complied with then-applicable company policy, as well as a potential conflict of interest involving a third-party sales agent for B/E Aerospace in China.[446] In addition to Rockwell's voluntary self-disclosure, the DOJ's decision to close its investigation into Rockwell may also relate to its recognition of "the potential benefits of corporate mergers and acquisitions, particularly when the acquiring entity has a robust compliance program in place and implements that program as quickly as practicable at the merged or acquired entity."[447]

Another noteworthy closure related to the charges brought by the SEC against Asante Berko, discussed above in further detail,[448] which did *not* involve any charges by the SEC against Berko's former employer. In that case, the SEC has charged Berko with violating the anti-bribery provision of the FCPA, and the factual allegations suggest that Berko took steps to circumvent his employer's controls, such as trying to conceal the bribery scheme from the legal and compliance personnel at both the subsidiary and the US company.[449] Notably, when the SEC announced the charges against Berko, Charles Cain, Chief of the SEC's FCPA Unit, highlighted that the "firm's compliance personnel took appropriate steps to prevent the firm from participating in the transaction" and as a

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[442] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 10 (Jan. 17, 2018), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[443] Uber Technologies, Inc., Current Report (Form 8-K) (Jan. 6, 2020), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001543151/b6d51776-ed5c-4f4d-be4c-af93b099f08d.pdf.
[444] Linda Chiem, *DOJ Ends Uber Foreign Bribery Probe With No Charges*, LAW360 (Jan. 6, 2020), https://www.law360.com/articles/1231684/doj-ends-uber-foreign-bribery-probe-with-no-charges.
[445] United Technologies Corporation, Annual Report (Form 10-K) (Feb. 6, 2020), https://ir.utc.com/node/23446/html.
[446] United Technologies Corporation, Annual Report (Form 10-K) (Feb. 6, 2020), https://ir.utc.com/node/23446/html. The DOJ and SEC closed their investigations on December 16, 2019 and January 16, 2020, respectively.
[447] US Department of Justice, FCPA Corporate Enforcement Policy, JUSTICE MANUAL § 9-47.120, https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
[448] *See supra* at pp. 57-58.
[449] Complaint, *SEC v. Berko*, No. 20-CV-01789, ¶¶ 76-80 (E.D.N.Y. Apr. 13, 2020).

result Berko's employer would not be charged, an unusual statement coming from SEC personnel.[450]

A final notable closure included the conclusion of the US and UK governments' corruption investigations into KBR Inc.[451] These closures were particularly interesting given the fact that the DOJ, SEC, and UK's SFO opted not to bring enforcement actions against KBR despite the guilty pleas (and likely cooperation) from two Unaoil executives in 2019 who were involved in the conduct under investigation.[452] The KBR case closure is discussed below in further detail.[453]

KEY LEGAL DEVELOPMENTS

A. Liu v. SEC

In 2020, the Supreme Court heard and decided a civil case regarding whether the SEC may seek disgorgement, one of the SEC's most important enforcement tools. In *Liu v. SEC*, the Court considered "[w]hether the Securities and Exchange Commission may seek and obtain disgorgement from a court as 'equitable relief' for a securities law violation even though th[e Supreme] Court has determined that such disgorgement is a penalty."[454] Although *Liu* did not involve the FCPA, it is relevant to FCPA enforcement because the SEC frequently utilizes disgorgement as a component of its settlements.

The issue presented in *Liu* was raised by five Justices during the 2017 oral argument for *Kokesh v. SEC*.[455] During that argument, Chief Justice Roberts noted that "[o]ne reason we have this problem is that the SEC devised this remedy or relied on this remedy without any support from Congress."[456] Similarly, Justice Kennedy asked whether there is "specific statutory authority that makes it clear that [a] district court can entertain [the] remedy" of disgorgement.[457] In the end, the Supreme Court's *Kokesh* decision expressly left open the issue of whether the SEC may ever seek disgorgement from a court at all.[458] That unanswered question was then presented in *Liu*.

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[450] US Securities and Exchange Commission Press Release No. 2020-88: SEC Charges Former Financial Service Executive With FCPA Violations (Apr. 13, 2020).
[451] KBR, Inc., Quarterly Report (Form 10-Q) (Aug. 6, 2020), http://d18rn0p25nwr6d.cloudfront.net/CIK-0001357615/a24f3150-88fb-4c23-9cf4-9fa127ce2c50.pdf.
[452] WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 63-64 (Jan. 17, 2018), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.
[453] *See infra* at pp. 93-94.
[454] Petition for Writ of Certiorari, *Liu v. SEC*, 140 S. Ct. 1936 (No. 18-1501), at I (May 31, 2019).
[455] Transcript of Oral Argument, *Kokesh v. SEC*, 137 S. Ct. 1635, at 7-8 (Kennedy, J.), 9 (Sotomayor, J.), 13 (Alito, J.), 31 (Roberts, C.J.), 52 (Gorsuch, J.) (2017) (No. 16-529).
[456] Transcript of Oral Argument, *Kokesh v. SEC*, 137 S. Ct. 1635, at 31:16-21 (2017) (No. 16-529).
[457] Transcript of Oral Argument, *Kokesh v. SEC*, 137 S. Ct. 1635, at 7:20-8:2 (2017) (No. 16-529).
[458] *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017). In *Kokesh*, the Court held that disgorgement in SEC enforcement actions is subject to a five-year statute of limitations under 28 U.S.C. § 2462. The Court concluded that because disgorgement in SEC cases operates as punishment for violations of public laws rather than compensation for private wrongs, it "bears all the hallmarks of a penalty" and is therefore subject to the five-year limitation set forth in the statute. *Id.* at 1644. For additional discussion on *Kokesh* and its implications, see WilmerHale, *Global Anti-Bribery Year-in-Review: 2017 Developments and Predictions for 2018*, at 53-56 (Jan. 12, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-01-12-global-anti-bribery-year-in-review-2017-developments-andpredictions-for-2018; WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 53-56 (Jan. 17, 2019),

In *Liu*, the SEC filed suit in federal court against defendants Charles Liu and Xin Wang, who operated an investment fund through which they raised almost $27 million from foreign investors who wanted to qualify for EB-5 visas.[459] Liu and Wang misappropriated the investors' money for their own benefit, which was raised for the building of a cancer treatment center that was never in fact built.[460] On a motion from the SEC, the court ordered Liu and Wang to disgorge roughly $26.7 million and imposed the maximum civil penalty authorized by statute.[461] In calculating disgorgement, the district court rejected Liu and Wang's argument that the total should reflect an offset for their legitimate business expenses (which would reduce their net profits and therefore the appropriate disgorgement amount), and ordered that Liu and Wang were jointly and severally liable for the full amount of disgorgement.[462]

The US Court of Appeals for the Ninth Circuit affirmed the lower court ruling.[463] In their petition for certiorari, Liu and Wang argued that the SEC lacked statutory authority to seek disgorgement because it is a punitive rather than an equitable remedy.[464] Alternatively, Liu and Wang argued that in calculating disgorgement, the lower court should have offset the amount that they raised through the offering by their legitimate business expenses, including monies they spent on lease payments and cancer-treatment equipment.[465]

In June 2020, the Supreme Court held in *Liu* that a disgorgement award is permissible equitable relief under 15 U.S.C. § 78u(d)(5) *only* when it does not exceed the wrongdoer's net profits *and* is awarded for victims.[466] The Supreme Court found that the SEC's historical practices of ordering proceeds to be deposited in US Treasury funds rather than disbursed to victims; imposing joint-and-several disgorgement liability; and declining to deduct legitimate expenses, were "in considerable tension with equity practices."[467]

At the same time, the opinion left open important questions, including what defendants must do when it is not feasible to return disgorged amounts to investors; how the obligation to pay disgorgement should be divided, if at all, among multiple defendants; and what should happen

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https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.

[459] Complaint, *SEC v. Charles Liu*, No. 16-CV-00974, ¶ 3 (C.D. Cal. May 26, 2016).

[460] *SEC v. Liu*, 262 F. Supp. 3d 957, 960 (C.D. Cal. 2017), *aff'd*, 754 F. App'x 505 (9th Cir. 2018), *vacated and remanded*, 140 S. Ct. 1936 (2020), and *vacated and remanded sub nom. SEC v. Liu*, 814 F. App'x 311 (9th Cir. 2020).

[461] *SEC v. Liu*, 262 F. Supp. 3d 957, 976 (C.D. Cal. 2017).

[462] *SEC v. Liu*, 262 F. Supp. 3d 957, 975-76 (C.D. Cal. 2017).

[463] *SEC v. Liu*, 754 F. App'x 505, 509 (9th Cir. 2018), *cert. granted*, 140 S. Ct. 451 (2019), and *vacated and remanded*, 140 S. Ct. 1936 (2020).

[464] Petition for Writ of Certiorari, *Liu v. SEC*, 140 S. Ct. 1936 (No. 18-1501), at 8-15 (May 31, 2019).

[465] Petition for Writ of Certiorari, *Liu v. SEC*, 140 S. Ct. 1396 (No. 18-1501), at 11 (May 31, 2019).

[466] *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020). In *Kokesh*, the Court cautioned that its decision should not be interpreted "as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings." *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 n.3 (2017). That question was squarely before the Court in *Liu*. Petition for Writ of Certiorari, *Liu v. SEC*, 140 S. Ct. 1936 (No. 18-1501), at I (May 31, 2019) ("Whether the Securities and Exchange Commission may seek and obtain disgorgement from a court as "equitable relief" for a securities law violation even though this Court has determined that such disgorgement is a penalty."); *see also* Brief for Petitioner, *Liu v. SEC*, 140 S. Ct. 1936 (No. 18-1501), at I (Sept. 4, 2019); Brief for Respondent in Opposition, *Liu v. SEC*, 140 S. Ct. 1936 (No. 18-1501), at 5-7 (Sept. 4, 2019).

[467] *Liu v. SEC*, 140 S. Ct. 1936, 1946 (2020).

when returning net profits to a "victim" will cause a windfall. In direct response to *Kokesh* and *Liu*, on January 1, 2021, Congress passed amendments to Section 21(d) of the Exchange Act, which expressly allow the SEC to obtain disgorgement in civil actions.[468] Pursuant to the amendments, the Commission may bring an action for disgorgement in federal court within five years of the most recent violations and, in the case of scienter-based violations, within ten years.[469] However, the amendments do not respond to *Liu*'s holding that disgorgements must be limited to the wrongdoer's net profits or its prohibition against seeking disgorgement against multiple wrongdoers under a joint-and-several liability theory.

Practically speaking, both the *Liu* decision and the recent amendments to the Exchange Act may have a limited effect on FCPA cases brought by the SEC since the vast majority of these cases are now resolved through administrative proceedings, which were not covered by the *Liu* decision. Similarly, the legislation affects remedies in civil proceedings, but does not amend securities laws governing the relief the SEC can obtain in administrative law proceedings and cease-and-desist proceedings, through which most corporate FCPA cases brought by the SEC are resolved. As a result, the legislation may not have a significant impact on the SEC's approach to FCPA cases. This legislation is discussed below in further detail.[470]

B. United States v. Coburn

In *United States v. Coburn*, the government prevailed in its interpretation of the proper "unit of prosecution" for charging defendants under the FCPA. In February 2020, Judge Kevin McNulty of the US District Court for the District of New Jersey ruled in *Coburn* that individual emails sent in furtherance of the same foreign bribery scheme are separate FCPA violations, with each email forming the basis for a separate "unit of prosecution."[471]

The grand jury indictment charged defendants Gordon Coburn and Steven Schwartz, two former executives of a US technology services company, with bribing government officials to secure a building planning permit in India. Coburn and Schwartz were each charged with one count of conspiracy to violate the FCPA and three substantive anti-bribery counts, along with eight non-FCPA counts.[472] The salient part of Judge McNulty's ruling focused on three interstate emails allegedly sent by Coburn in furtherance of the scheme. The indictment charged each of these three emails as a separate substantive FCPA count.

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[468] National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 6501.
[469] National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 6501.
[470] *See infra* at pp. 78-79.
[471] *United States v. Coburn*, 439 F. Supp. 3d 361, 380 (D.N.J. 2020). Judge McNulty defined the "unit of prosecution" as "the precise act a defendant is prohibited from performing." *Id.* at 373.
[472] It is worth noting that one of the defendants challenged two of the three substantive FCPA counts, arguing that he was not referenced in two of the three descriptions in the allegedly inculpatory emails, and therefore the grand jury may not have charged him. Judge McNulty disagreed, ruling that the indictment was clear in showing that the grand jury charged both defendants. *United States v. Coburn*, 439 F. Supp. 3d 361, 368-72 (D.N.J. 2020).

Coburn moved to dismiss the indictment, arguing in part that the three separate counts were multiplicitous.[473] He argued that Congress passed the FCPA to punish bribery, not the use of email, so the correct "unit of prosecution" should be the payment of a bribe to a foreign official.[474] In the defendant's view, the interstate emails, which were set forth in the indictment as the basis to satisfy the interstate commerce requirement of the anti-bribery allegations under 15 U.S.C. § 78dd-1, would simply establish a basis for federal jurisdiction over the subsequent bribery conduct, rather than be the proscribed acts themselves.[475]

Judge McNulty disagreed, ruling that the three separate FCPA charges were not multiplicitous and could stand, taking what he described as "a commonsense [sic] look at the nature of the prohibition to discern what [Congress] intended as the unit of prosecution."[476] Judge McNulty looked first to the language of the FCPA, observing that the "operative verb" proscribed by the relevant provisions of the statute is "to make use of interstate facilities such as email" because the statute bans making "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" an improper payment.[477] He concluded that "the use of . . . the interstate emails is literally the proscribed act."[478] In doing so, Judge McNulty disposed of the defense's argument that the interstate emails were only a jurisdictional requirement, concluding that the use of cross-border email communications to accomplish foreign bribery "bears enough earmarks of wrongfulness to suggest that it is central to the offense, and not a mere jurisdictional appendage."[479]

Judge McNulty then looked to statutes that he viewed as analogous to the FCPA. He first considered federal mail and wire fraud statutes, which he reasoned were aimed at combating fraud in the same way the FCPA is aimed at combating foreign bribery. Judge McNulty found that under these fraud statutes, it is "well-settled" that each mailing or wire communication can be separately charged.[480] Similarly, under the Travel Act, which prohibits acts of interstate travel or use of interstate commerce with the intent to further unlawful activity, each act of interstate travel and interstate commerce may be the subject of a separate criminal charge, even if all are done to promote a single unlawful activity.[481] Judge McNulty found that these statutes were analogous and that they confirmed that the operative language of the FCPA should be treated the same: the proper unit of prosecution is the individual act of making use of interstate facilities—or in other words, Coburn's pressing "send" on each email.

As Judge McNulty pointed out, the US Court of Appeals for the Third Circuit has yet to weigh in on the correct "unit of prosecution" in an FCPA action and no other court has yet ruled on this issue, so

[473] An indictment is impermissibly multiplicitous if it "charges the same offense in two or more counts and [therefore] may lead to multiple sentences for a single violation." *United States v. Coburn*, 439 F. Supp. 3d 361, 372 (D.N.J. 2020) (citing *United States v. Pollen*, 978 F.2d 78, 84 (3d Cir. 1992)).
[474] Def. Coburn Mot. to Dismiss, *United States v. Coburn*, No. 19-CR-120, at 2-8 (D.N.J. Nov. 15, 2019).
[475] Def. Coburn Mot. to Dismiss, *United States v. Coburn*, No. 19-CR-120, at 5 (D.N.J. Nov. 15, 2019).
[476] *United States v. Coburn*, 439 F. Supp. 3d 361, 372 (D.N.J. 2020).
[477] *United States v. Coburn*, 439 F. Supp. 3d 361, 373 (D.N.J. 2020); 15 USC § 78dd-1.
[478] *United States v. Coburn*, 439 F. Supp. 3d 361, 374 (D.N.J. 2020).
[479] *United States v. Coburn*, 439 F. Supp. 3d 361, 380 (D.N.J. 2020).
[480] *United States v. Coburn*, 439 F. Supp. 3d 361, 377 (D.N.J. 2020).
[481] *United States v. Coburn*, 439 F. Supp. 3d 361, 377-80 (D.N.J. 2020).

his ruling could be tested by appellate review, although a notice of appeal has yet to be filed.[482] If it stands, however, this ruling could raise the stakes for individuals and corporations accused of FCPA violations. Defendants charged with paying a bribe, effected through the sending and receipt of multiple emails, may now face multiple charges. In terms of practical implications, the ruling may give the DOJ and SEC increased leverage in settlement negotiations involving individuals as well as companies. In addition, the ruling could mean that two cases involving a single foreign bribe could potentially result in significantly different charges depending on the number of emails or phone calls made to or from the United States in connection with that bribe. That said, under the Sentencing Guidelines, multiple charges relating to the same nucleus of conduct are generally grouped when calculating the sentence, such that the ruling's impact may not result in dramatically different sentencing outcomes across cases. Similarly, to the extent that penalties in SEC cases typically are driven mostly by disgorgement, the amount of disgorgement also would not likely change based on additional violations charged due to multiple emails.

C. United States v. Hoskins

In our 2019 Global Anti-Bribery Year-in-Review, we reported on the November 2019 trial and jury verdict following the August 2018 Second Circuit decision in *United States v. Hoskins*. Lawrence Hoskins, a British national who formerly worked for a British subsidiary of French power company Alstom, was indicted in 2013 based on allegations that Alstom's US-based subsidiary had retained consultants to bribe Indonesian officials to secure power supply contracts.[483] The DOJ argued that Hoskins was liable for participating in the conspiracy because, although it was not alleged he had taken any action within the United States, Hoskins authorized payments to the consultants for the purpose of paying the bribes on behalf of the US subsidiary.[484]

In 2018, the Second Circuit held that if a foreign national could not be charged with a substantive FCPA violation because he or she acted as an agent of a "domestic concern" or took any improper act while physically present in the United States, he or she could not then be charged with conspiracy to violate the FCPA under federal conspiracy statutes or with any other accessory liability theory.[485] The Second Circuit thus upheld the dismissal of conspiracy charges but remanded the case for trial on the theory that he acted as an agent of Alstom's US subsidiary.[486] At a jury trial in November 2019, the government prevailed on its theory that Hoskins acted as an agent of a domestic concern while participating in a bribe scheme overseas, even though he was not employed by that domestic concern. Hoskins was convicted of six counts of violating the anti-bribery provision of the FCPA, three counts of money laundering, one count of conspiracy to violate the FCPA, and one count of conspiracy to commit money laundering,[487] after the final jury

[482] *United States v. Coburn*, 439 F. Supp. 3d 361, 376 (D.N.J. 2020).
[483] US Department of Justice Press Release No. 13-862: Former Senior Executive of French Power Company Charged in Connection with Foreign Bribery Scheme (July 30, 2013).
[484] *United States v. Hoskins*, 902 F.3d 69, 72 (2d Cir. 2018).
[485] *United States v. Hoskins*, 902 F.3d 69, 84-97 (2d Cir. 2018).
[486] *United States v. Hoskins*, 902 F.3d 69, 72-73, 97-98 (2d Cir. 2018).
[487] US Department of Justice Press Release No. 19-1219: Former Senior Alstom Executive Convicted at Trial of Violating the Foreign Corrupt Practices Act, Money Laundering and Conspiracy (Nov. 8, 2019); Verdict Form, *United States v. Lawrence Hoskins*, No. 12-CR-00238 (D. Conn. Nov. 6, 2019).

instructions provided that the jury could infer an agency relationship between Hoskins and Alstom's US subsidiary "circumstantially" and that "control [over the agent by the domestic concern] need not to be present at every moment."[488]

In February 2020, in a very rare ruling, Judge Janet Bond Arterton of the US District Court for the District of Connecticut overturned the jury's conviction on the FCPA and related conspiracy charges, ruling that the government failed to present sufficient evidence to establish an agency relationship between Hoskins and the US subsidiary.[489] Judge Arterton's ruling held that the standard for establishing an agency relationship requires: (1) the principal's authority or the ability to control the agent, consistent with traditional notions of agency law, and (2) the parties' agreement or understanding that the principal has control of the agent's actions.[490] She ruled that, notwithstanding the jury verdict, the government failed to meet either requirement.[491]

Judge Arterton found that although the government produced evidence that Hoskins, under the direction of a US subsidiary, revised and exchanged consultancy agreements related to the bribery and offered advice to the US subsidiary on payment terms for those agreements,[492] the US subsidiary controlled only the processes through which the consultants were engaged, and not the consultants' actions themselves.[493] The US subsidiary did not, for example, have the power to fire or demote Hoskins, impact his compensation, terminate his authority to participate in the hiring of consultants, or otherwise exert control over his actions.[494] Judge Arterton also found that the typical factors indicative of an agency relationship, such as the US subsidiary's right to terminate Hoskins' role in approving and authorizing consultant payments, were not present.[495]

Judge Arterton further found that the US subsidiary did not exert authority or have the ability to control Hoskins as a purported agent, that the parties did not believe otherwise, and that the government failed to show that Hoskins himself understood his relationship with the US subsidiary

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[488] Transcript of Jury Instructions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 1246-48 (D. Conn. Nov. 6, 2019); Ruling on Defendant's Motion for Agency Instruction, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 2 (D. Conn. Aug. 23, 2019). The final jury instructions, which leaned closely to the government's broader definition of agency, differed substantially from Hoskins' proposed instructions, which would have specified that, to establish agency, the domestic concern must have "controlled, or had the right to control, [his] day-to-day work for the duration of the agency relationship."

[489] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 18 (D. Conn. Feb. 26, 2020).

[490] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 18 (D. Conn. Feb. 26, 2020).

[491] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 18 (D. Conn. Feb. 26, 2020).

[492] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 6-8 (D. Conn. Feb. 26, 2020).

[493] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 14-15 (D. Conn. Feb. 26, 2020).

[494] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 9, 16-18 (D. Conn. Feb. 26, 2020); *see also* Third Restatement § 1.01 cmt. f (The "principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority.").

[495] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 8-9 (D. Conn. Feb. 26, 2020).

to be one of an agent and principal.[496] Judge Arterton concluded that merely exercising control over "important elements of the broader project [at issue]" would be insufficient to establish an agency relationship if the purported principal lacks interim control over how the individual performs the tasks.[497] Accordingly, Judge Arterton acquitted Hoskins of all FCPA charges, concluding that there was "no evidence upon which a rational jury could conclude that Mr. Hoskins" was an agent of a domestic concern under the relevant principles of agency law.[498] Judge Arterton granted Hoskins' motion for a new trial on the FCPA-related counts on a "conditional" basis if the DOJ appeals the ruling and the acquittal is "later vacated or reversed."[499]

Separately, Judge Arterton denied Hoskins' motion for a judgement of acquittal regarding the three counts of money laundering and one count of conspiracy to commit money laundering, finding that the jury's determination that Hoskins would have been aware that the funds would pass through the United States was reasonable.[500] Hoskins was ultimately sentenced to 15 months in prison and ordered to pay a $30,000 fine related to the money laundering convictions.[501] Both Hoskins and the US government submitted notices of appeal against Judge Arterton's decision in March 2020.[502]

If sustained on appeal, Judge Arterton's ruling will further limit the DOJ's ability to reach certain foreign nationals implicated in bribery schemes where those foreign nationals have not taken clear, physical acts in support of the improper conduct in the United States simply through charging decisions that involve an expansive interpretation of agency law. The ruling could also have additional implications for companies, not just individuals, as it could similarly serve as a significant limiter in the US government's effort to expand the FCPA's territorial reach to foreign subsidiaries based on a secondary theory of liability. Furthermore, an affirmation of the *Hoskins* decision, which illustrates the highly fact-based and nuanced nature of an agency analysis, could deter the DOJ from seeking to pursue aggressive agency theories on parent companies for FCPA violations by joint ventures, subsidiaries or other noncontrolled entities abroad.[503] Thus, we would expect, and

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[496] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 18 (D. Conn. Feb. 26, 2020).
[497] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 6, 15 (D. Conn. Feb. 26, 2020).
[498] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 18 (D. Conn. Feb. 26, 2020).
[499] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 27 (D. Conn. Feb. 26, 2020).
[500] Ruling on Defendant's Rule 29(C) and Rule 23 Motions, *United States v. Lawrence Hoskins*, No. 12-CR-00238, at 11, 29 (D. Conn. Feb. 26, 2020).
[501] US Department of Justice Press Release No. 20-287: Former Senior Alstom Executive Sentenced to Prison for Role in Money Laundering Scheme to Promote Foreign Bribery (Mar. 6, 2020).
[502] In March 2020, both Hoskins and the DOJ filed timely notices of appeal. The DOJ filed a brief in July 2020, arguing that Judge Arterton usurped the jury when throwing out its charges simply because she did not agree with its decision. Hoskins filed a reply brief in October 2020, arguing that the judge's "thoughtful" and "well-reasoned" decision should be affirmed and that the money laundering charges should be reversed because the government failed to allege the bribe transactions were initiated from Connecticut. As of the date of this publication, oral argument has not been scheduled.
[503] Relatedly, in a December 2019 conference, AAG Benczkowski stated that the DOJ "is not looking to stretch the bounds of agency principles beyond recognition" and that, as an example, the DOJ "will not suddenly be taking the position that every subsidiary, joint venture, or affiliate is an 'agent' of the parent company simply by virtue of ownership status." Brian A. Benczkowski, Assistant Attorney General, DOJ, Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference.

have seen, US authorities seeking to gather more evidence of a US company's control over an alleged agent and focusing more acutely on a fact-intensive inquiry regarding the parent's control over affiliates and business partners, including factors surrounding the party's subjective understanding as to whether the party's actions were controlled by that parent.[504]

D. United States v. Ho

In December 2020, the Second Circuit upheld the bribery convictions of former Hong Kong Home Secretary Chi Ping Patrick Ho, who had been convicted by a jury in December 2018 on FCPA and money laundering charges.[505] In 2018, the jury found that Ho, who was the secretary general of a US non-governmental organization (NGO) funded by CEFC Energy, a privately owned Chinese oil and gas conglomerate, orchestrated two schemes to bribe government officials in Chad and Uganda to secure advantages for CEFC China, including by presenting $2 million in cash to the president of Chad and conspiring to funnel a bribe to the Ugandan Minister of Foreign Affairs to steer potential business advantages to CEFC Energy.[506] Ho was charged and convicted under both the § 78dd-2 and § 78dd-3 provisions of the FCPA on the theory that he was both an officer or director of a US domestic concern *and* a foreign national who had taken acts in furtherance of a bribery scheme while physically present in the United States. In pre-trial briefing, Judge Loretta Preska of the Southern District of New York rejected Ho's argument that he could not be charged with both provisions, holding that they were not intended to be mutually exclusive as long as each jurisdictional requirement is met. In March 2019, Ho received a three-year prison sentence and was fined $400,000.[507]

On appeal, Ho argued that there was insufficient evidence to substantiate his FCPA and money laundering convictions. Specifically, Ho contended that there was insufficient evidence to establish that he acted on behalf of the "domestic concern" of which he was an officer or director as required to convict under § 78dd-2 of the FCPA because CEFC Energy, and not the US NGO, was the ultimate object of Ho's assistance.[508] The Second Circuit found, however, that the statutory language of the FCPA did not require that the domestic concern itself be the ultimate object of the assistance, but instead precluded officers and directors of domestic concerns from paying bribes to foreign officials "in order to assist such domestic concern[s] in obtaining or retaining business for or with, or directing business to, any person."[509] The Second Circuit specifically pointed out that the phrase "directing business to" is followed by the phrase "any person," which indicated that the statute was not solely concerned with entities or persons steering business towards themselves,

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[504] *See also* WilmerHale, *FCPA Litigation Update: DOJ Theories on Unit of Prosecution and Agency Tested, to Mixed Results* (Mar. 4, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200304-fcpa-litigation-update-doj-theories-on-unit-of-prosecution-and-agency-tested-to-mixed-results.
[505] US Department of Justice Press Release No. 18-426: Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Convicted of International Bribery, Money Laundering Offenses (Dec. 5, 2018).
[506] US Department of Justice Press Release No. 18-426: Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Convicted of International Bribery, Money Laundering Offenses (Dec. 5, 2018).
[507] US Department of Justice Press Release No. 19-097: Patrick Ho, Former Head of Organization Backed by Chinese Energy Conglomerate, Sentenced to 3 Years in Prison for International Bribery and Money Laundering Offenses (Mar. 25, 2019).
[508] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *4 (2d. Cir. Dec. 29, 2020).
[509] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *4-5 (2d. Cir. Dec. 29, 2020).

and noted that the Second Circuit had previously recognized "the FCPA prohibits commercial bribery without regard to whether the briber himself profits directly from the business obtained."[510] The Second Circuit also noted that the statute addressed the goal of corruptly assisting a domestic entity in obtaining business either "for or with" another company, suggesting that the domestic concern need not itself be seeking to obtain business "with" that company.[511] As such, the Second Circuit concluded that the plain language of § 78dd-2 indicates Ho could be convicted if the jury found that he acted on behalf of a domestic concern to assist that domestic concern in obtaining business for CEFC Energy, and that the evidence introduced at trial was "more than sufficient" to prove that Ho acted on behalf of the US NGO, which operated as an arm of CEFC 's non-profit Hong Kong-based NGO, to assist in obtaining business for CEFC Energy.[512]

Ho also argued that a violation of § 78dd-3 could not serve as the specified unlawful activity underlying his money laundering convictions, stating that § 78dd-3 was not a part of the FCPA until 1998, which was six years after Congress amended the relevant money laundering statute in 1992 to add felony violations of the FCPA as a "specified unlawful activity."[513] The Second Circuit rejected this argument, stating that the money laundering statute's "unambiguous" incorporation of the FCPA "in its entirety" made clear that Congress was not required to specify that its references to the FCPA included subsequent amendments.[514]

Finally, the Second Circuit also rejected Ho's arguments that the money laundering statute did not reach the transactions at issue, which Ho argued only passed through correspondent banks in the United States, and did not originate "from" or go "to" bank accounts in the United States, because they were sent from Hong Kong to Uganda.[515] The Second Circuit concluded that the money laundering statute permits a prosecution to be brought in "any district in which the financial or monetary transaction is conducted," which includes the use of US EFT and corresponding bank transfers.[516] Noting that Ho took advantage of US-based correspondent accounts to conduct dollar-denominated transactions, the Second Circuit held that nothing in the money laundering statute's venue provisions prevented the court from finding that the transactions at issue could be considered severable, and resting in the United States, when moving through correspondent banks.[517] This holding in particular may lead to a more aggressive use of the money laundering statute where the only US nexus is the passage of funds through US-based correspondent accounts.

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[510] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *5 (2d. Cir. Dec. 29, 2020) (citing *United States v. Ng Lap Seng*, 934 F.3d 110, 145 (2d Cir. 2019) (explaining that the FCPA "prohibits bribery designed to obtain, retain, or direct business not only for or to the briber, but for or to 'any person'").]
[511] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *5 (2d. Cir. Dec. 29, 2020).
[512] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *5 (2d. Cir. Dec. 29, 2020).
[513] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *6-7 (2d. Cir. Dec. 29, 2020); *see* 18 U.S.C. § 1956(c)(7).
[514] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *8 (2d. Cir. Dec. 29, 2020).
[515] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *8-9 (2d. Cir. Dec. 29, 2020).
[516] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *10 (2d. Cir. Dec. 29, 2020); 18 U.S.C. § 1956(i)(1)(A).
[517] *United States v. Ho*, No. 19-761, 2020 WL 7702576, at *10-11 (2d. Cir. Dec. 29, 2020).

E. Legislative Developments

1. SEC Whistleblower Awards Program

In September 2020, the SEC Commissioners voted 3-2 to approve amendments to rules governing the SEC's whistleblower awards program.[518] The Commission also simultaneously published guidance on how it would determine award amounts for eligible whistleblowers.[519] Since its inception in 2011, the SEC's whistleblower awards program has facilitated the Commission's collection of over $2.5 billion in financial remedies relating to violations of US securities laws (including the FCPA) and has resulted in approximately $738 million in whistleblower awards.[520] The amendments will likely increase award amounts and award processing efficiency for many future whistleblowers.

The SEC's whistleblower program continues to allow whistleblowers to receive an award of between 10% and 30% of the fines levied as a result of a tip reporting potential violations of US securities laws.[521] In instances where the awards are estimated to be $5 million or less, the amendments establish a presumption that the whistleblower is entitled to the statutory maximum of 30% of the fines levied.[522] This presumption can be rebutted by the presence of negative award criteria (specified in Exchange Act Rule 21F-6(b)),[523] but the Commission expects that this change will allow it to process claims and issue awards more quickly.[524] The Commission's analysis of awards over $5 million (pursuant to Rule 21F-6) will not be affected by the amendments. Notably, the Commission did not adopt a proposed amendment that would have created a formalized "enhanced review" of awards in cases with monetary penalties of over $100 million, though the Commission made clear that it can exercise its (preexisting) discretion to set the award amount in dollar or percentage terms.[525] Critics, including the two Commissioners who voted against the amendment, contend that the use of the Commission's discretion might produce disparate outcomes for tipsters.[526]

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[518] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[519] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[520] US Securities and Exchange Commission Press Release No. 2021-007: SEC Awards Nearly $600,000 to Whistleblower (Jan. 14, 2021).
[521] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[522] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[523] 17 C.F.R. § 240.21F-6(b) provides that "[t]he Commission will assess the culpability or involvement of the whistleblower" and may consider factors such as the whistleblower's education and experience, the whistleblower's role in the securities violation (including whether the whistleblower benefitted financially from the violations), the egregiousness of the fraud, and whether the whistleblower knowingly interfered in the Commission's investigation.
[524] Mengqi Sun, *SEC Votes to Amend Whistleblower-Award Rules*, WALL ST. J. (Sept. 23, 2020), https://www.wsj.com/articles/sec-votes-to-amend-whistleblower-award-rules-11600877179?page=1.
[525] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[526] Mengqi Sun, *SEC Votes to Amend Whistleblower-Award Rules*, WALL ST. J. (Sept. 23, 2020), https://www.wsj.com/articles/sec-votes-to-amend-whistleblower-award-rules-11600877179?page=1.

In response to the Supreme Court's February 2018 decision in *Digital Realty Trust, Inc. v. Somers*, the SEC also amended the definition of "whistleblower" set forth in Rule 21F-2.[527] In *Digital Realty Trust*, the Court addressed the question of whether the anti-retaliation provision of the Dodd-Frank Act extended to an individual who did not report a violation to the SEC, and therefore fell outside the statute's definition of "whistleblower."[528] The Court unanimously held that the textual definition of "whistleblower" in Dodd-Frank requires a potential whistleblower to report a violation to the SEC in order to receive an award or protection under the statute; a potential whistleblower who does not report a violation to the SEC and/or only internally reports a violation therefore is not entitled to the protections of Dodd-Frank's anti-retaliation provisions.[529] Consistent with the Court's holding, the SEC's amendment provides that a whistleblower must report information about potential violations of securities laws in writing directly to the Commission to receive whistleblower protections.[530]

Additionally, the Commission amended its definition of "action" to include DPAs, Non-prosecution Agreements (NPAs), and other settlement agreements.[531] The revised definition will apply retroactively to any settlement entered following the effective date of Dodd-Frank (July 21, 2010), and allow payments to whistleblowers who provide information that leads to a DPA or NPA.[532] The Commission will accept applications for awards in connection with previously entered settlements for up to 90 days after the effective date of the amendments.[533]

Finally, the Commission also amended its definition of "related action" to limit a whistleblower's ability to collect multiple awards where a tip leads to action by multiple regulatory authorities.[534] Prior to implementation of the amendment, Exchange Act Rule 21F-3 provided that whistleblowers may be eligible for awards based on "amounts collected in certain related actions."[535] The amendments make clear that other regulatory actions will not be considered "related" for award purposes if the Commission determines that another agency's award scheme "more appropriately applies."[536]

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[527] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[528] *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018).
[529] *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 778 (2018).
[530] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[531] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[532] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[533] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[534] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).
[535] 17 C.F.R. § 240.21F-3(b).
[536] US Securities and Exchange Commission Press Release No. 2020-219: SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020).

2. SEC Approves Rule Requiring Mandatory Disclosures by Resource Extraction Companies

After two previous efforts to pass a similar rule failed in recent years,[537] in December 2020, SEC Chair Jay Clayton and two SEC commissioners voted to approve a rule that would require resource extraction issuers (i.e., oil, gas, and mining companies) to file annual reports with the Commission disclosing certain payments to the US government or any foreign government made in connection with the commercial development of extractive resources.[538] The rule implements Section 13(q) of the Securities Exchange Act, added by Dodd-Frank, which mandates the disclosure of government payments by issuers in the extractive resource industries.[539] The Commission announced that the rule is intended to increase transparency of payments made to governments in connection with commercial extractive resource development and comply with the Congressional Review Act.[540]

Pursuant to the new rule, resource extraction issuers that are required to file reports under Section 13 or 15(d) of the Securities Exchange Act will be required to disclose "project-level" payment information; issuers will also need to disclose payments to foreign or US governments made by their subsidiaries or entities under their control.[541] The rule will require disclosure of payments, whether made individually or in a series, to governments that equal or exceed $100,000.[542] After a two-year transition period, issuers will be required to submit a Form SD, containing any required disclosures of these payments, within 270 days of the end of their most recently completed fiscal year.[543] The rule does not specify a penalty for failure to timely file a Form SD, but the Commission is authorized to levy fines to enforce reporting requirements pursuant to the Securities Exchange Act.[544] The final rule will become effective 60 days after publication in the Federal Register, which occurred on January 15, 2021.[545]

Critics claim that the broad definition of "project" will not advance the stated anti-corruption goals because aggregation of payments within the same project could hide payments made in connection with particular contracts from public view.[546] The revised rule issued in 2020 is perceived to be more favorable to companies than previous iterations of the rule for several reasons, including the

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[537] US Securities and Exchange Commission Press Release No. 2015-277: SEC Proposes Rules for Resource Extraction Issuers Under Dodd-Frank Act (Dec. 11, 2015); US Securities and Exchange Commission Press Release No. 2019-264: SEC Proposes Rules to Implement the Statutory Mandate to Adopt Resource Extraction Disclosure Rules (Dec. 18, 2019).
[538] Clara Hudson, *SEC Approves Long-debated Disclosure Rule on Foreign Government Payments*, GLOBAL INVESTIGATIONS REVIEW (Dec. 16, 2020), https://globalinvestigationsreview.com/just-anti-corruption/anti-corruption/sec-approves-long-debated-disclosure-rule-foreign-government-payments.
[539] 15 U.S.C. § 78m(q)(2)(A).
[540] US Securities and Exchange Commission Press Release No. 2020-318: SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020).
[541] US Securities and Exchange Commission Press Release No. 2020-318: SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020).
[542] US Securities and Exchange Commission Release No. 34-90679: Disclosure of Payments by Resource Extraction Issuers, at 55-60 (Dec. 16, 2020).
[543] US Securities and Exchange Commission Press Release No. 2020-318: SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020).
[544] *See* 15 U.S.C. § 78ff.
[545] 86 Fed. Reg. 4662 (Jan. 15, 2021).
[546] Clara Hudson, *SEC Approves Long-debated Disclosure Rule on Foreign Government Payments*, GLOBAL INVESTIGATIONS REVIEW (Dec. 16, 2020), https://globalinvestigationsreview.com/just-anti-corruption/anti-corruption/sec-approves-long-debated-disclosure-rule-foreign-government-payments.

adopted definition of "project."[547] In contrast to the previously proposed versions, the final rule defines "project" to "require disclosure at the national and major subnational political jurisdiction, as opposed to the contract, level."[548] Additionally, the final rule contains exemptions for "smaller reporting companies and emerging growth companies," which were included to address concerns that Section 13(q)'s reporting requirements could impede growth of smaller companies.[549] Finally, the implementation of Section 13(q) may not impose additional disclosure requirements for issuers that already report similar payments on a contract-by-contract basis pursuant to European Union (EU) or Canadian regulations, and some companies may, on a voluntary basis, disclose payments on a more granular basis in the interest of transparency.[550]

3. Legislative Expansion of SEC Disgorgement Authority

In January 2021, Congress passed the National Defense Authorization Act (NDAA), an annual defense spending bill that secures pay raises for troops and authorizes funding for national security programs, for the 60th consecutive year.[551] Notably, the 2021 NDAA contained amendments to Section 21(d) of the Securities Exchange Act of 1934 (Exchange Act), which codified and expanded the power of the SEC to obtain disgorgement in civil actions.[552] These amendments give the SEC, for the first time in its history, explicit statutory authority to seek disgorgement in federal district court, and also doubles the time period for which the SEC may seek disgorgement in cases involving fraud from five years to ten years. The amendments are effective immediately upon enactment and also apply to any matter currently pending on the date of enactment of the NDAA.

The amendments to Section 21(d) of the Exchange Act appear to be a direct response to the Supreme Court's recent decisions in *Kokesh v. SEC*[553] and *Liu v. SEC*,[554] both of which curtailed

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[547] Clara Hudson, *SEC Approves Long-debated Disclosure Rule on Foreign Government Payments*, GLOBAL INVESTIGATIONS REVIEW (Dec. 16, 2020), https://globalinvestigationsreview.com/just-anti-corruption/anti-corruption/sec-approves-long-debated-disclosure-rule-foreign-government-payments.
[548] US Securities and Exchange Commission Press Release No. 2020-318: SEC Adopts Final Rules for the Disclosure of Payments by Resource Extraction Issuers (Dec. 16, 2020).
[549] US Securities and Exchange Commission Release No. 34-90679: Disclosure of Payments by Resource Extraction Issuers, at 71-75 (Dec. 16, 2020).
[550] Clara Hudson, *SEC Approves Long-debated Disclosure Rule on Foreign Government Payments*, GLOBAL INVESTIGATIONS REVIEW (Dec. 16, 2020), https://globalinvestigationsreview.com/just-anti-corruption/anti-corruption/sec-approves-long-debated-disclosure-rule-foreign-government-payments.
[551] The House and Senate both voted to override President Trump's veto of the NDAA. *See* Amanda Macias and Kevin Breuninger, *House Overrides Trump Veto of $740 Billion Defense Bill, Sends to GOP-led Senate*, CNBC (Dec. 28, 2020), https://www.cnbc.com/2020/12/28/house-votes-to-override-trump-ndaa-veto.html; Andrew Duehren, *Senate Overrides Trump's Veto of NDAA Defense Bill*, WALL ST. J. (Jan. 1, 2021), https://www.wsj.com/articles/senate-overrides-trumps-veto-of-defense-bill-11609529894.
[552] National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 6501; *see also* WilmerHale, *Congress Amends Exchange Act, Expanding SEC Enforcement Power* (Jan. 4, 2021), https://www.wilmerhale.com/en/insights/client-alerts/20210104-congress-amends-exchange-act-expanding-sec-enforcement-power.
[553] *Kokesh v. SEC*, 137 S. Ct. 1635, 1639 (2017) (holding that disgorgement was a "penalty" and was thus subject to the statute of limitations in 28 U.S.C. § 2462, which imposes a five-year limitation any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise"). *See also* WilmerHale, *Implications of the Supreme Court's Kokesh Decision* (Jun. 19, 2017), https://www.wilmerhale.com/en/insights/client-alerts/2017-06-19-implications-of-the-supreme-courts-kokesh-decision.
[554] *Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020) (holding that, while the SEC could obtain disgorgement in federal court actions under the prior version of Section 21(d), that authority was subject to critical limitations, including that the disgorgement does not exceed the wrongdoer's "net profits and is awarded for victims" and was returned to persons harmed by the defendant's violations). *See also* WilmerHale, *Liu v. SEC: The U.S.*

the SEC's ability to obtain disgorgement for several reasons. *First*, the amendments expressly grant the SEC authority to obtain disgorgement in civil actions of "any unjust enrichment by the person who received such unjust enrichment as a result of such violation," establishing that the SEC has statutory power to seek disgorgement in federal court.[555] *Second*, although actions for disgorgement must be brought "not later than five years after the latest date of the violations" that gave rise to the action, the amendments permit the SEC to seek disgorgement up to ten years after the latest date of the violation for scienter-based violations, which doubles the time period for disgorgement previously allotted by *Kokesh*.[556] *Finally*, although the amendments do not explicitly address *Liu*'s holding that disgorgement cannot be awarded against multiple wrongdoers under a joint-and-several liability theory and that disgorgement must be limited to the wrongdoer's net profits, the statutory language of the amendments provides a compelling basis for defendants to argue that the SEC must deduct a defendant's legitimate expenses when calculating disgorgement awards and against theories of joint-and-several liability in the context of disgorgement.[557]

Practically speaking, the amendments may have a limited effect on FCPA cases brought by the SEC since the vast majority of these cases are now resolved through administrative proceedings, which were not covered by the *Kokesh* and *Liu* decisions. Similarly, the legislation affects remedies in civil proceedings, but does not amend securities laws governing the relief the SEC can obtain in administrative law proceedings and cease-and-desist proceedings, through which most corporate FCPA cases brought by the SEC are resolved. As a result, the legislation may not have a significant impact on the SEC's approach to FCPA cases.

COLLATERAL ACTIONS

A. Shareholder Lawsuits

Over the course of 2020, companies undergoing (or having recently resolved) FCPA investigations also faced shareholder lawsuits claiming that they mislead investors by failing to disclose corrupt conduct or that the companies' directors breached their fiduciary duties by failing to prevent bribery, in all instances leading to investor harm. Several of these cases demonstrate how investors can successfully secure damages against companies undergoing such investigations. Below are illustrative instances of a variety of shareholder suits either brought in 2020 or which had important rulings in 2020.

1. Cognizant Technology Solutions

In June 2020, a judge in the US District Court for the District of New Jersey denied Cognizant Technology Solutions Corp.'s three separate motions to dismiss a shareholders' securities class

Supreme Court Upholds the SEC's Power to Obtain Disgorgement in Civil Actions, But With Important Limitations (Jun. 24, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200624-liu-v-sec-the-us-supreme-court-upholds-the-secs-power-to-obtain-disgorgement-in-civil-actions-but-with-important-limitations.
[555] National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 6501.
[556] National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 6501.
[557] National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, § 6501.

action against the company and two individual defendants.[558] The court preserved a late judge's previous finding in an August 2018 opinion that the company "made materially false and misleading statements by overstating its earnings as a result of the bribery scheme."[559]

Investors filed a second amended complaint against Cognizant and two of its former executives in April 2019 after the SEC brought FCPA charges against the company for its payments to Indian government officials.[560] Cognizant moved to dismiss plaintiffs' complaint, arguing, in part, that plaintiffs failed to allege both scienter and that Cognizant made material misstatements or omissions.[561] Cognizant contended that the misstatements and any "immaterial payments" did not indicate "widespread corporate fraud," and that scienter could not be imputed to the company for the former officers' actions because neither "made any of the allegedly misleading statements."[562] Cognizant further argued that plaintiffs' allegations were portraying "isolated outlier conduct involving only a few former employees and immaterial payments that were concealed from Cognizant itself."[563]

The court denied defendants' motions to dismiss, holding that plaintiffs sufficiently alleged actionable misstatements and "a strong inference of scienter as to Cognizant . . . ."[564] The court ruled that the investors could sue Cognizant because of its former employees' actions and because the fraudulent scheme "plausibly extended" to other Cognizant employees.[565] The court also determined that control person liability claims could be brought against the individual defendants because, in addition to the executive positions the former employees held, the investors sufficiently alleged how Cognizant's former president and chief legal officer had "power or influence" over the company's operations over the course of the alleged misconduct.[566]

Notably, the court ruled that plaintiffs failed to establish under Rule 10b-5(b) that Cognizant's former legal officer was the "maker" of statements in earnings releases attached to SEC filings.[567] The plaintiffs did not allege the former executive "was quoted in any of the financial earnings press releases" accompanying Cognizant's SEC filings; that his name or contact information appeared on

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[558] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *1 (D. N.J. June 5, 2020).
[559] *See generally* Second Amended Complaint, *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-CV-06509 (D. N.J. Apr. 26, 2019); *see also In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *13 (D. N.J. June 5, 2020).
[560] Second Amended Complaint, *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-CV-06509, ¶¶ 6-7 (D. N.J. Apr. 26, 2019); US Securities and Exchange Commission Press Release No. 2019-12: SEC Charges Cognizant and Two Former Executives With FCPA Violations (Feb. 15, 2019).
[561] Memorandum of Law in Support of Cognizant Technology Solutions Corporation's Motion to Dismiss Second Amended Class Action Complaint, *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-CV-06509, at 3-5 (D. N.J. June 10, 2019).
[562] Memorandum of Law in Support of Cognizant Technology Solutions Corporation's Motion to Dismiss Second Amended Class Action Complaint, *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-CV-06509, at 4, 26 n.11 (D. N.J. June 10, 2019).
[563] Memorandum of Law in Support of Cognizant Technology Solutions Corporation's Motion to Dismiss Second Amended Class Action Complaint, *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-CV-06509, at 37 (D. N.J. June 10, 2019).
[564] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *31 (D. N.J. June 5, 2020).
[565] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *28 (D. N.J. June 5, 2020).
[566] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *33 (D. N.J. June 5, 2020).
[567] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *13-16 (D. N.J. June 5, 2020).

the releases; or that he was responsible for reviewing or approving the releases prior to issuing them.[568] Despite this finding, however, the court applied the Supreme Court's decision in *Lorenzo v. SEC*, and ruled that plaintiffs sufficiently alleged "scheme liability" against the former executive.[569]

Finally, the court held that plaintiffs sufficiently alleged corporate scienter.[570] While the Third Circuit lacked precedent on corporate scienter theory, other circuits applied three different approaches the court would evaluate: the narrow, broad, and middle approaches.[571] The court determined that plaintiffs sufficiently alleged corporate scienter under each application.[572]

2. Cemex, S.A.B. de C.V.

As discussed in last year's Year-in-Review, in July 2019 a judge in the US District Court for the Southern District of New York dismissed an investor-led securities class action against Cemex, S.A.B. de C.V. and two of its officers for failing to allege scienter with respect to the company's statements regarding ongoing litigation related to bribery charges.[573] Investors first brought the lawsuit in March 2018 after the company disclosed that the DOJ and SEC were investigating bribery charges and its operations in Colombia in connection with the development of a new cement plant.[574] Despite the dismissal, the court allowed plaintiffs leave to amend their complaint.[575]

In August 2019, the plaintiffs filed an amended complaint, adding Cemex Latam Holdings, S.A., a subsidiary of Cemex and holding company for Cemex's operations in various Latin American countries, as a defendant for the first time.[576] The underlying facts of the case remained the same. But in February 2020, the court dismissed the amended complaint with prejudice for failure to state

[568] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *15 (D. N.J. June 5, 2020).
[569] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *16-18 (D. N.J. June 5, 2020). In *Lorenzo*, the Court held that an employee who sent emails his supervisor authored and approved to potential investors and that contained information the employee knew to be false could be implicated by scheme liability even though he was not the "maker" of the statements. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1099-1101 (2019).
[570] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *24 (D. N.J. June 5, 2020).
[571] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *24-31 (D. N.J. June 5, 2020).
[572] *In re Cognizant Tech. Sol. Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *24, 28, 31, 33 (D. N.J. June 5, 2020). In a footnote, the court also declined Cognizant's request to state that the choice between the three standards was dispositive of the case's outcome. The court additionally stated that it would entertain any future motion for interlocutory appeal. *In re Cognizant Technology Solutions Corp. Sec. Litig.*, No. 16-6509, 2020 WL 3026564, at *24 n.15 (D. N.J. June 5, 2020).
[573] WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 60 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020; Order, *Schiro v. Cemex, S.A.B. de C.V.*, No. 18-CV-2352, at 11, 14, 16, 18 (S.D.N.Y. July 12, 2019).
[574] Christine Murray, *Mexico's Cemex Says Under U.S. DOJ Investigation*, REUTERS (Mar. 14, 2018), https://www.reuters.com/article/us-cemex-investigation/mexicos-cemex-says-under-u-s-doj-investigation-idUSKCN1GQ1WZ.
[575] Order, *Schiro v. Cemex, S.A.B. de C.V.*, No. 18-CV-2352, at 16, 29 (S.D.N.Y. July 12, 2019).
[576] *Schiro v. Cemex, S.A.B. de C.V.*, 438 F. Supp. 3d 194, 197 (S.D.N.Y. 2020).

a claim.[577] The court ruled that plaintiffs failed to sufficiently plead facts describing the elements of the company's alleged wrongdoing.[578]

The court also granted Cemex Latam's motion to dismiss because plaintiffs asserted their Exchange Act Section 20(b) claim against Cemex Latam more than two years after plaintiffs discovered facts about the violation.[579] Therefore, plaintiffs' claim was time-barred.

3. BRF S.A.

In May 2020, BRF S.A., a Brazilian meat and food processing company, reached a $40 million shareholder settlement to resolve a stock-drop suit alleging the company participated in a bribery scheme to conceal unsanitary practices at its meatpacking facilities.[580] The Brazilian investigation into the alleged bribery scheme resulted in arrests of BRF employees as well as various raids of BRF's facilities.[581]

Plaintiffs alleged in their fourth amended complaint filed in November 2019 that the company "engaged in an unprecedented and massive case of food fraud."[582] The plaintiffs claimed that senior executives and top management were involved in the scheme, which included lobbying food regulators and other politicians "to subvert inspections in order to conceal unsanitary practices" at the defendant's meatpacking facilities, forging laboratory results, and improperly using chemicals and additives.[583] The plaintiffs further alleged that the defendants failed to disclose material facts and made false statements to investors about the company's growth, its focus on product quality and food safety, as well as its abidance with laws and internal certification standards.[584]

In the May 2020 settlement agreement, the company denied allegations of fault, liability, wrongdoing, or damages, and denied committing any act or making any materially misleading statement giving rise to liability under federal securities laws.[585]

4. Kornecki v. Airbus

In August 2020, shareholders brought a stock-drop suit against Airbus for securities fraud, claiming that the company misled investors about the corruption probes discussed above.[586]

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[577] *Schiro v. Cemex, S.A.B. de C.V.*, 438 F. Supp. 3d 194, 197 (S.D.N.Y. 2020).
[578] *Schiro v. Cemex, S.A.B. de C.V.*, 438 F. Supp. 3d 194, 198 (S.D.N.Y. 2020).
[579] *Schiro v. Cemex, S.A.B. de C.V.*, 438 F. Supp. 3d 194, 201 (S.D.N.Y. 2020).
[580] Stipulation Settlement, *In re BRF S.A. Securities Litigation*, No. 18-CV-02213 (S.D.N.Y. May 8, 2020); *see also* Dean Seal, *Brazilian Meatpacker BRF Settles Shareholder Suit for $40M*, LAW360 (May 11, 2020), https://www.law360.com/articles/1271999/brazilian-meatpacker-brf-settles-shareholder-suit-for-40m.
[581] Fourth Amended Complaint, *In re BRF S.A. Sec. Litig.*, No. 18-CV-02213, ¶¶ 4, 8 (S.D.N.Y. Nov. 8, 2019).
[582] Fourth Amended Complaint, *In re BRF S.A. Sec. Litig.*, No. 18-CV-02213, ¶ 3 (S.D.N.Y. Nov. 8, 2019).
[583] Fourth Amended Complaint, *In re BRF S.A. Sec. Litig.*, No. 18-CV-02213, ¶ 3 (S.D.N.Y. Nov. 8, 2019).
[584] Fourth Amended Complaint, *In re BRF S.A. Sec. Litig.*, No. 18-CV-02213, ¶ 3 (S.D.N.Y. Nov. 8, 2019).
[585] Stipulation Settlement, *In re BRF S.A. Sec. Litig.*, No. 18-CV-02213, at 3 (S.D.N.Y. May 8, 2020).
[586] *See supra* at pp. 36-38; *see also* Jonathan Stempel, *Airbus Shareholders in U.S. File Fraud Lawsuit Over Disclosures, Corruption Probes*, REUTERS (Aug. 6, 2020), https://www.reuters.com/article/us-airbus-lawsuit/airbus-shareholders-in-u-s-file-fraud-lawsuit-over-disclosures-corruption-probes-idUSKCN2522O4.

Shareholders alleged in their August 2020 complaint that defendants made materially false and misleading statements related to the company's business, compliance, and operational policies.[587] The shareholders further alleged that defendants made false and misleading statements, and failed to disclose: (1) that the company's policies and protocols were insufficient to ensure that the company complied with anti-corruption laws; (2) that the company engaged in bribery, corruption, and fraud; (3) that the company's earnings were a product of unlawful conduct; (4) the full scope and severity of the company's wrongdoing; (5) that resolution of investigations into the company would foreseeably result in the company paying billions of dollars in settlements and legal fees and continuously subject the company to further government investigations and oversight; and (6) that, therefore, the company's public statements were materially false and misleading.[588] The suit is currently pending before the US District Court for the District of New Jersey.

5. Glencore Investor Lawsuit

Following Glencore Plc's announcement in July 2018 that it had received a subpoena from the DOJ related to the company's compliance with the FCPA and US money laundering statutes, investors filed a stock-drop suit against the company.[589] In July 2020, a judge in the District Court of New Jersey granted Glencore's motion to dismiss on *forum non conveniens* grounds, finding that it would have been more appropriate for the plaintiffs to bring the claims in a different forum.[590]

The court agreed with Glencore that plaintiffs' claims targeted conduct that occurred abroad, and determined that the claims had "no apparent connection to New Jersey."[591] Instead, the court found that "the center of defendants' purported securities violations appear[ed] to have occurred abroad in Switzerland, where the alleged misstatements/omissions were drafted and approved."[592] While acknowledging that a court should rarely disturb a plaintiff's choice of forum, the court ruled that it would accord plaintiffs less deference because they neither sufficiently alleged that they had a connection to New Jersey, nor that Glencore had offices or subsidiaries within the state.[593] The court further determined that because the plaintiffs' allegations centered around claims targeting conduct occurring overseas, "documentary evidence of the alleged securities fraud is likely contained in Switzerland," with most witnesses living outside New Jersey.[594]

6. Sociedad Química y Minera de Chile SA

In November 2020, Chilean mining company Sociedad Química y Minera de Chile SA settled an investor-led class action lawsuit for $62.5 million.[595] In 2017, SQM entered resolution agreements

[587] Complaint, *Kornecki v. Airbus SE*, No. 20-CV-10084, ¶ 6 (D. N.J. Aug. 6, 2020).
[588] Complaint, *Kornecki v. Airbus SE*, No. 20-CV-10084, ¶ 5 (D. N.J. Aug. 6, 2020).
[589] Complaint, *Church v. Glencore PLC*, No. 18-CV-11477, ¶ 21 (D. N.J. July 9, 2018).
[590] *Church v. Glencore PLC*, No. 18-11477, 2020 WL 4382280, at *1, 4, 7 (D. N.J. July 31, 2020).
[591] *Church v. Glencore PLC*, No. 18-11477, 2020 WL 4382280, at *6 (D. N.J. July 31, 2020).
[592] *Church v. Glencore PLC*, No. 18-11477, 2020 WL 4382280, at *6 (D. N.J. July 31, 2020).
[593] *Church v. Glencore PLC*, No. 18-11477, 2020 WL 4382280, at *3-4 (D. N.J. July 31, 2020).
[594] *Church v. Glencore PLC*, No. 18-11477, 2020 WL 4382280, at *4 (D. N.J. July 31, 2020).
[595] Ines Kagubare, *SQM to Pay $62.5 Million to Settle Class Action Lawsuit*, GLOBAL INVESTIGATIONS REVIEW (Nov. 12, 2020), https://globalinvestigationsreview.com/just-anti-corruption/bribery/sqm-pay-625-million-settle-bribery-related-class-action-lawsuit.

with the DOJ and SEC totaling $30 million after the company was charged with violating the FCPA's internal controls provision and for violating the books and records provision.[596] The SEC also charged SQM's former CEO with FCPA violations.[597]

Investors sued SQM in 2015 for failing to disclose an alleged bribery scheme in the company's securities filings.[598] The company, in turn and in part, argued that the investors were indifferent to the alleged fraud and purchased shares despite the allegations.[599] A judge in the Southern District of New York, however, rejected the company's argument and certified the investors' class action lawsuit in 2019.[600] The settlement agreement represents another recent example of investors successfully obtaining settlement amounts in connection with claims for damages against large companies for violating the FCPA.

B. RICO Suits

1. Keppel Offshore & Marine Ltd.

In February 2018, eight investment funds managed by EIG Management Company, LLC (EIG, collectively plaintiffs) filed a $660 million civil Racketeer Influenced and Corrupt Organizations Act (RICO) suit against Keppel Offshore & Marine Ltd. in the Southern District of New York.[601] Plaintiffs' amended complaint, filed in April 2018, relies heavily on Keppel's 2017 settlement with the DOJ for FCPA violations.[602] Plaintiffs alleged that Keppel; Petrobras; the Worker's Party of Brazil, the governing political party in Brazil at all relevant times; and Sete Brasil Participacoes, S.A., an entity created by Petrobras, were all members of a RICO conspiracy that engaged in bribery and kickbacks.[603] The predicate acts for the RICO conspiracy were alleged violations of the Travel Act, money laundering, and wire fraud as described in Keppel's December 2017 DPA with the DOJ.[604] Specifically, Keppel allegedly aided Petrobras and Sete in fraudulently raising capital from third parties in order to purportedly fund the cost of construction, but in actuality to pay bribes and

[596] Order Instituting Cease-and-Desist Proceedings, *In the Matter of Sociedad Química y Minera de Chile, S.A.*, Rel. No. 79795, File No. 3-17774 (Jan. 13, 2017); Deferred Prosecution Agreement, *United States v. Sociedad Química y Minera de Chile, S.A.*, No. 17-CR-00013 (D.D.C. Jan. 13, 2017).
[597] US Securities and Exchange Commission Press Release No. 2018-212: SEC Charges Former CEO of Chilean-Based Chemical and Mining Company With FCPA Violations (Sept. 25, 2018).
[598] Complaint, *Villella v. Chemical & Mining Co. of Chile Inc.*, No. 15-CV-02106 (S.D.N.Y. Mar. 19, 2015); *see also* Ines Kagubare, *SQM to Pay $62.5 Million to Settle Class Action Lawsuit*, GLOBAL INVESTIGATIONS REVIEW (Nov. 12, 2020), https://globalinvestigationsreview.com/just-anti-corruption/bribery/sqm-pay-625-million-settle-bribery-related-class-action-lawsuit.
[599] Opinion and Order, *Villella v. Chemical & Mining Company of Chile, Inc.*, No. 15-CV-02106, at 21 (S.D.N.Y. Sept. 24, 2019).
[600] Opinion and Order, *Villella v. Chemical & Mining Company of Chile, Inc.*, No. 15-CV-02106 (S.D.N.Y. Sept. 24, 2019); *see also* Clara Hudson, *SQM Bribery Lawsuit Gains Traction*, GLOBAL INVESTIGATIONS REVIEW (Sept. 25, 2019), https://globalinvestigationsreview.com/just-anti-corruption/sqm-bribery-lawsuit-gains-traction.
[601] Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047 (S.D.N.Y. Feb. 6, 2018).
[602] Deferred Prosecution Agreement, *United States v. Keppel Offshore & Marine Ltd.*, No. 17-CR-00697, Attachment A (E.D.N.Y. Dec. 22, 2017).
[603] First Amended Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047, ¶¶ 3-4, 54 (S.D.N.Y. Apr. 30, 2018).
[604] First Amended Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047, ¶¶ 1-2 (S.D.N.Y. Apr. 30, 2018).

kickbacks.[605] Keppel allegedly met several times with the EIG funds regarding Sete but never informed the funds that Keppel planned to and did pay millions of dollars in bribes and kickbacks to obtain Sete contracts.[606] The funds invested over $221 million in Sete, which allegedly were used to fund improper payments to obtain drillship contracts.[607]

In May 2020, the court dismissed plaintiffs' RICO conspiracy claim, finding that the Private Securities Litigation Reform Act (PSLRA), which "bars civil RICO claims alleging predicate acts of securities fraud," applied to the predicate acts of wire fraud alleged.[608] Furthermore, because the wire fraud, Travel Act, and money laundering predicate acts alleged were all part of the same claim, the entire RICO claim was barred.[609] Although plaintiffs argued that Keppel's DPA with the DOJ constitutes a criminal conviction for purposes of the exception to the PSLRA bar, the court rejected this argument and found that a party that enters into a DPA "has not been convicted of a crime."[610] The court reasoned that the "obvious purpose of entering into a deferred prosecution agreement is to avoid a criminal conviction," therefore, it was "completely illogical to contend that an agreement expected to lead to dismissal of criminal charges actually constitutes a conviction."[611] While the RICO conspiracy claim was dismissed, the court denied defendant's motion to dismiss as to plaintiffs' aiding and abetting fraud claims. The case is currently pending.

2. Petrobras America v. Samsung Heavy Industries

In March 2019, Petrobras America, a subsidiary of the state-controlled oil company in Brazil, filed a complaint in Texas state court against Samsung Heavy Industries, a South Korean shipbuilding company, alleging fraud and civil RICO violations arising from Samsung's scheme to pay bribes to officials in Brazil in order to secure the sale of an offshore oil drill ship.[612] Samsung Heavy removed the action to the Southern District of Texas. Samsung Heavy had a drillship-construction contract with a drilling company, Pride Global, which included an option for Samsung Heavy to build a drillship if Pride secured a drilling-services contract to operate the drillship.[613] Petrobras alleged that Samsung Heavy bribed two Petrobras officials to cause Petrobras to enter into a drilling services contract with Pride so that Pride would exercise its option with Samsung Heavy to build

[605] First Amended Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047, ¶ 5 (S.D.N.Y. Apr. 30, 2018).
[606] First Amended Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047, ¶ 6 (S.D.N.Y. Apr. 30, 2018).
[607] First Amended Complaint, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047, ¶ 8 (S.D.N.Y. Apr. 30, 2018).
[608] Memorandum and Order, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047, at 13-14 (S.D.N.Y. May 11, 2020).
[609] Memorandum and Order, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047, at 17 (S.D.N.Y. May 11, 2020).
[610] Memorandum and Order, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047, at 14 (S.D.N.Y. May 11, 2020).
[611] Memorandum and Order, *EIG Energy Fund XIV, L.P. et al. v. Keppel Offshore & Marine Ltd.*, No. 18-CV-01047, at 14, 16 (S.D.N.Y. May 11, 2020).
[612] *Petrobras America, Inc. v. Samsung Heavy Industries Co., Ltd.*, No. 19-CV-01410 (S.D. Tex. Mar. 5, 2019).
[613] Memorandum and Opinion, *Petrobras America, Inc. v. Samsung Heavy Industries Co., Ltd.*, No. 19-CV-01410 (S.D. Tex. June 19, 2020).

the drillship, which became operational in 2011.[614] In November 2019, Samsung Heavy entered into a DPA with the DOJ to settle charges based on the alleged conduct.[615]

In June 2020, the court dismissed Petrobras's complaint as time-barred, finding that by 2014, Petrobras "knew or should have known about the bribery and corruption within the company, and knew or should have known that the bribery and the corruption extended to the drillship at issue here."[616] Therefore, the four-year statute of limitations began to run on the RICO and fraud claims in 2014, at the latest, and Petrobras did not begin its litigation until March 2019.[617]

3. Citgo Petroleum Corporation v. Manuel Gonzalez Testino

In May 2020, Citgo Petroleum Corporation, a Texas-based subsidiary of PDVSA, filed a complaint in the Southern District of Texas against Jose Manuel Gonzalez Testino and his company Petroleum Logistics Service Corp. (PLS) alleging breach of contract, fraud, and civil RICO violations arising from a bribery scheme in which Testino took part.[618] In May 2019, Testino pleaded guilty to violations of the FCPA and failure to file a foreign bank account report. [619] Testino admitted to paying bribes to several PDVSA and Citgo officials in order for his companies to obtain lucrative government contracts.[620] Citgo alleged that Testino bribed Citgo employees to induce Citgo to enter into a service agreement with PLS in 2014 and to secure numerous transactions from 2014 to 2018 in which PLS served as a procurement and logistics vendor pursuant to the service agreement.[621] Citgo also alleged that it lost millions of dollars as a result of paying inflated prices for goods and services provided by PLS suppliers and subcontractors, and paying PLS a 5.75% commission based on the inflated prices.[622] The case is currently pending.

4. Harvest Natural Resources

In February 2018, Harvest Natural Resources sued Rafael Dario Ramirez Carreno (former president of PDVSA and Venezuela's former Minister of Energy) and others under RICO, bribery, and antitrust statutes.[623] Harvest alleged that PDVSA and the Venezuelan government withheld approval for Harvest to sell its energy assets because Harvest refused Ramirez's demands for

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[614] Memorandum and Opinion, *Petrobras America, Inc. v. Samsung Heavy Industries Co., Ltd.*, No. 19-CV-01410, at 2, 8 (S.D. Tex. June 19, 2020).
[615] US Department of Justice Press Release No. 19-1301: Samsung Heavy Industries Company Ltd Agrees to Pay $75 Million in Global Penalties to Resolve Foreign Bribery Case (Nov. 22, 2019)
[616] Memorandum and Opinion, *Petrobras America, Inc. v. Samsung Heavy Industries Co., Ltd.*, No. 19-CV-01410, at 6-7 (S.D. Tex. June 19, 2020).
[617] Memorandum and Opinion, *Petrobras America, Inc. v. Samsung Heavy Industries Co., Ltd.*, No. 19-CV-01410, at 8 (S.D. Tex. June 19, 2020).
[618] Complaint, *Citgo Petroleum Corp. v. Petroleum Logistics Service Corp. and Jose Manuel Gonzalez Testino*, No. 20-CV-01820, ¶ 1 (S.D. Tex. May 26, 2020).
[619] US Department of Justice Press Release No. 19-593: Business Executive Pleads Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme (May 29, 2019).
[620] US Department of Justice Press Release No. 19-593: Business Executive Pleads Guilty to Foreign Bribery Charges in Connection with Venezuela Bribery Scheme (May 29, 2019).
[621] Complaint, *Citgo Petroleum Corp. v. Petroleum Logistics Service Corp. and Jose Manuel Gonzalez Testino*, No. 20-CV-01820, ¶¶ 4, 28, 31 (S.D. Tex. May 26, 2020).
[622] Complaint, *Citgo Petroleum Corp. v. Petroleum Logistics Service Corp. and Jose Manuel Gonzalez Testino*, No. 20-CV-01820, ¶ 16 (S.D. Tex. May 26, 2020).
[623] *Harvest Nat. Res. v. Ramirez Carreno*, No. 18-CV-00483 (S.D. Tex. Feb. 16, 2018).

bribes.[624] Harvest later sold the assets to a different buyer in 2016 for approximately $470 million less than the price of its original deal.[625] The court granted Harvest's motion for default judgment in December 2018 after Ramirez failed to respond within the time limit, and entered a final default judgment in February 2019 awarding treble damages of $1.4 billion, post-judgment interest, and attorneys' fees and costs.[626]

Ramirez filed in June 2019 a motion to set aside the default judgment and dismiss the case. In June 2020, the court vacated the default judgment, finding that: "(1) Ramirez's default was not willful because he believed he had not been served; (2) Ramirez presented a meritorious defense; and (3) the policy disfavoring default judgments, especially one of this magnitude, outweighs the potential prejudice Harvest would suffer if the default judgment is vacated."[627] However, the court did not dismiss the case, and the case is currently pending.[628]

C. Restitution

In 2020, a restitution claim was settled after the court found former shareholders were victims under the Mandatory Victim Restitution Act (MVRA). In 2020, there were also several instances of a fairly new trend where foreign governments have sought restitution as putative victims of FCPA violations. If such claims succeed, this sort of proceeding could be a significant collateral consequence for companies undergoing (or having recently resolved) FCPA investigations.

1. United States v. Alarcon (PetroEcuador)

In March 2020, Judge Rodney Smith of the Southern District of Florida denied Ecuador's state-owned oil company PetroEcuador's request to receive restitution from Jose Melquiades Cisneros Alarcon, who pleaded guilty in August 2019 to charges related to a bribery scheme involving PetroEcuador officials.[629] Judge Smith found that PetroEcuador did not qualify as a victim under the MVRA because PetroEcuador was not "directly and proximately harmed as a result" of the bribery scheme.[630] Judge Smith also found that PetroEcuador was "complicit" in the wrongdoing and would be considered a co-conspirator, which precluded it from attaining victim status under the MVRA.[631]

2. PDVSA

In April 2020, the administration of Juan Guaidó, the acting president of Venezuela as declared by that country's National Assembly, filed a motion, on behalf of PDVSA, seeking recognition as a victim in a bribery and money laundering scheme committed by its employees and a restitution

[624] *Harvest Nat. Res. v. Ramirez Carreno*, No. H 18-483, 2020 WL 3063940, at *2 (S.D. Tex. June 9, 2020).
[625] *Harvest Nat. Res. v. Ramirez Carreno*, No. H 18-483, 2020 WL 3063940, at *2 (S.D. Tex. June 9, 2020).
[626] *Harvest Nat. Res. v. Ramirez Carreno*, No. H 18-483, 2020 WL 3063940, at *2 (S.D. Tex. June 9, 2020).
[627] *Harvest Nat. Res. v. Ramirez Carreno*, No. H 18-483, 2020 WL 3063940, at *17 (S.D. Tex. June 9, 2020).
[628] *Harvest Nat. Res. v. Ramirez Carreno*, No. H 18-483, 2020 WL 3063940, at *20 (S.D. Tex. June 9, 2020).
[629] Order, *United States v. Jose Melquiades Cisneros Alarcon*, No. 19-CR-20284 (S.D. Fla. Mar. 3, 2020).
[630] Order, *United States v. Jose Melquiades Cisneros Alarcon*, No. 19-CR-20284, at 1 (S.D. Fla. Mar. 3, 2020).
[631] Order, *United States v. Jose Melquiades Cisneros Alarcon*, No. 19-CR-20284, at 1 (S.D. Fla. Mar. 3, 2020).

award of $560 million. In the underlying matter, the DOJ alleged that Abraham Edgardo Ortega, a Venezuelan national and former executive director of finance at PDVSA, was one of the co-conspirators in the scheme.[632] In October 2018, Ortega pleaded guilty to one count of conspiracy to commit money laundering.[633]

In its motion, the Guaidó administration argued that PDVSA was a victim under the MVRA because it was directly harmed by the commission of the offense to which Ortega pleaded guilty and by his participation in the bribery scheme. [634] The Guaidó administration stated that this conduct caused PDVSA to suffer losses exceeding $560 million.[635] Ortega admitted in his plea agreement to accepting $12 million in bribes in return for providing favorable treatment to some of PDVSA's joint venture partners. The Guaidó administration also asserted that PDVSA did not knowingly participate in the scheme; therefore, it should not be precluded from attaining victim status. The Venezuelan administration noted that courts in the Eleventh Circuit "routinely accord victim status and order the payment of restitution to organizations whose rogue employees and officers—like Ortega—have embezzled from them or have otherwise unlawfully diverted their funds."[636] This motion is currently pending.

3. United States v. OZ Africa Management

In 2020, a long-running dispute collateral to Och-Ziff Capital Management Group's 2016 FCPA settlement was resolved. In September 2016, Och-Ziff entered into a DPA with the DOJ to resolve criminal charges and agreed to pay a criminal penalty of more than $213 million in connection with a scheme to bribe officials in the DRC and Libya.[637] Och-Ziff's wholly owned subsidiary, OZ Africa Management GP LLC, pleaded guilty to one-count of conspiracy to violate the anti-bribery provisions of the FCPA. In February 2018, former shareholders in Africo Resources Ltd., a company whose mining rights were taken allegedly as a result of Och-Ziff's misconduct, interceded in OZ Africa's sentencing, claiming that they were victims and entitled to up to $600 million in restitution.[638] As discussed in last year's Year-in-Review, in August 2019—in an unprecedented ruling in the context of corporate criminal FCPA resolutions—Judge Nicholas Garaufis of the Eastern District of New York found that the former Africo shareholders were victims under the

[632] Complaint, *United States v. Abraham Edgardo Ortega*, No. 18-CR-20685 (S.D. Fla. July 24, 2018).
[633] US Department of Justice Press Release No. 18-1427: Former Executive Director at Venezuelan State-Owned Oil Company, Petroleos De Venezuela, S.A., Pleads Guilty to Role in Billion-Dollar Money Laundering Conspiracy (Oct. 18, 2019).
[634] Motion for Victim Status and Restitution, *United States v. Abraham Edgardo Ortega*, No. 18-CR-20685, at 10 (S.D. Fla. Apr. 24, 2020).
[635] Motion for Victim Status and Restitution, *United States v. Abraham Edgardo Ortega*, No. 18-CR-20685, at 10 (S.D. Fla. Apr. 24, 2020).
[636] Motion for Victim Status and Restitution, *United States v. Abraham Edgardo Ortega*, No. 18-CR-20685, at 11 (S.D. Fla. Apr. 24, 2020).
[637] US Department of Justice Press Release No. 16-1130: Och-Ziff Capital Management Admits to Role in Africa Bribery Conspiracies and Agrees to Pay $213 Million Criminal Fine (Sept. 29, 2016).
[638] Letter for Africo Resources Ltd. Equity Holders, *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-00515 (E.D.N.Y. Feb. 16, 2018).

MVRA and entitled to restitution.[639] In September 2019, Judge Garaufis asked for supplemental briefing regarding calculation of the amount owed in restitution.[640]

After briefing regarding disputes over valuation of the mine, the former Africo shareholders in May 2020 decreased their request to $421.8 million in restitution.[641] In July 2020, the Africo shareholders and OZ Africa reached an agreement for a $146 million restitution deal.[642]

KEY INTERNATIONAL LEGAL DEVELOPMENTS

A. United Kingdom

1. Legislative and Policy Developments

The UK government's legislative energy seems to have been largely absorbed by the twin threats of the pandemic and the country's exit from the EU, two issues likely to continue well past 2020. The development of anti-bribery and anti-corruption legislation in the United Kingdom continues to move at a glacial pace, which is perhaps unsurprising given the challenges posed by the year 2020.

Questions continue to be raised about whether the United Kingdom's corporate criminal liability law is sufficient.[643] Typically, criminal liability can only be attributed to corporations through the acts or omissions of the company's senior officers or "directing minds," the so-called "identification principle." However, some offenses, such as failure to prevent bribery, are subject to strict liability. SFO directors repeatedly have highlighted the identification principle as a significant obstacle to securing criminal convictions against companies.[644] In November 2020, the government issued its response to a 2017 call for reform of the law on corporate liability for economic crime, in which the government concluded that the evidence for reform was inconclusive and, as a result, commissioned a review of the existing law to be undertaken by the Law Commission. There is no deadline for the Law Commission review, although the Commission anticipates completing the

[639] *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-00515, 2019 WL 419904, at *1-2 (E.D.N.Y. Aug. 29, 2019); *see* WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020* (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.
[640] *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-00515, 2019 WL 419904, at *1 (E.D.N.Y. Aug. 29, 2019).
[641] Letter for Africo Resources Ltd. Equity Holders, *United States v. OZ Africa Mgmt. GP, LLC*, No. 16-CR-00515 (E.D.N.Y. May 1, 2020).
[642] Sculptor Capital Management, Inc., Form 8-K (July 24, 2020), https://sec.report/Document/0001403256-20-000141/.
[643] 11 Nov. 2020, Parl Deb HC (2020) col. 99 (UK) (Financial Services Bill (Fourth sitting)), https://hansard.parliament.uk/Commons/2020-11-19.
[644] Lisa Osofsky, Director of SFO, Address to the Royal United Services Institute on Future Challenges in Economic Crime: A View from the SFO (Oct. 9, 2020), https://www.sfo.gov.uk/2020/10/09/future-challenges-in-economic-crime-a-view-from-the-sfo/; *David Green, Director of UK's Serious Fraud Office, Keynote at Program for Corporate Compliance and Enforcement conference*, NYU LAW NEWS (Apr. 29, 2016), https://www.law.nyu.edu/news/David-Green-Serious-Fraud-Office-UK-corporate-compliance-criminal-liability.

review in late 2021. The process may be expedited by the Commission's finalization of a review of substantially similar legal issues in 2010.[645]

The UK-US Bilateral Data Sharing Agreement (the Data Sharing Agreement) came into force in July 2020. The Data Sharing Agreement follows two pieces of legislation, the 2018 Clarifying Lawful Overseas Use of Data Act (CLOUD Act) in the United States and the 2019 Crime (Overseas Production Orders) Act in the United Kingdom. The effect of this legislation and the Data Sharing Agreement is that law enforcement agencies in the United Kingdom may be able to bypass the usual MLAT process when obtaining data held in the United States. Obtaining evidence through the MLAT process is notoriously slow, so this new process may speed up SFO investigations.

Although there has been little new legislation of note, in January 2020 the SFO published helpful extracts from its internal handbook, including chapters on Evaluating Compliance Programs (the Compliance Guidance) and DPA Guidance. The DPA Guidance collates and consolidates information from a range of sources relating to DPAs, such as the SFO's Corporate Co-Operation Guidance (which can also be found in the SFO's internal handbook). While the DPA Guidance is a useful starting point it does not replace careful scrutiny of the DPA Code of Practice and the relevant legislation when considering the resolution of a criminal investigation.[646] Similarly, the Compliance Guidance lacks the precision required to inform the strategic legal decision making of a well-advised corporation. The Compliance Guidance outlines the time periods when compliance regimes will be considered by the SFO, how to investigate a compliance program, and what issues should be considered in assessing a compliance regime.[647]

2. Enforcement Efforts

The SFO experienced difficulties at the start of the pandemic, and its investigative slowdown appears to be a result of COVID-19 disruption rather than strategic policy. Although its record on prosecutions of individuals remains weak, the SFO continues to achieve noteworthy DPA settlements.

The SFO continued two key enforcement trends in 2020: success in securing DPAs and mixed results in prosecuting individuals. The SFO secured three DPAs in 2020: with Airbus SE and with Airline Services Limited for bribery-related offenses, and with G4S Care & Justice Services (UK) Ltd for fraud. The two most significant trials in 2020 of individuals related to the Unaoil investigation, for bribery offenses, and the Barclays investigation, for alleged fraud offenses. The former resulted in two convictions and a retrial, and the latter in three acquittals. The Barclays trial was a particularly heavy blow to the SFO as it represented the only action taken by the agency in

[645] Law Commission, *Criminal Liability in Regulatory Contexts* (Consultation Paper No 195, Aug. 25, 2010), http://www.lawcom.gov.uk/app/uploads/2015/06/cp195_Criminal_Liability_consultation.pdf.
[646] Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice* (2013); Crime and Courts Act 2013, c. 22, sch. 17 (UK).
[647] The latter section fails to live up to its promise; rather, it simply summarizes the 'six principles' set out by the Ministry of Justice in its Bribery Act 2010 guidance, published in 2011, and states that smaller businesses may have alternative procedures in place that may be considered adequate.

relation to the 2008 financial crisis. The SFO suffered numerous setbacks in this case, with charges against the bank thrown out by the Crown Court in 2018, a decision that was then upheld by the High Court, which also refused permission for the SFO to appeal to the Supreme Court of the United Kingdom.[648] The case against one individual was dismissed in 2019, while the remaining three were acquitted after less than six hours of deliberation by the jury.[649]

Lisa Osofsky's first full year as Director of the SFO was 2019, which ended up as a unique year for the number of cases dropped, rather than opened or prosecuted, by the SFO. It is unsurprising that one of her first actions would be to clear out weak cases. More significantly, in 2020, new cases are being opened at a much lower rate than cases are being closed or concluded. In 2019 to 2020, the SFO's caseload was 65, down from 70 in 2018 to 2019.[650] The most high-profile case to be dropped in 2020 was the SFO's investigation of De La Rue Plc, which commenced in 2019 but closed just 11 months later.[651] This rapid turnaround contrasts starkly with a recent SFO investigation into a UK pharmaceutical company, which was closed in 2019 after five years of investigation. In September 2020, the Director stressed that "aging cases are not good for prosecutors either" and emphasized her intent to increase the pace of SFO investigations.[652] This focus by the Director may have led to the prompt closure of the De La Rue investigation.

The reduction in the new case rate has been exacerbated by the COVID-19 pandemic, with a report by HM Crown Prosecution Service Inspectorate finding that the SFO struggled to adapt in the early stages of the pandemic.[653] The primary problem identified in the report was that although the SFO had invested significantly in document processing and document analysis technology, its IT systems overwhelmingly were set up for in-office working, which created significant difficulties when the agency shifted to remote work. In response to a Freedom of Information Act Request made by Global Investigations Review, the SFO disclosed that between March 2020 and April 2020 it had not conducted any suspect or compelled interviews, applied for any search warrants, nor conducted any raids.[654] Moreover the SFO disclosed that it had issued just 16 notices to produce

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[648] SFO News Release, Former Barclays Executives Acquitted of Conspiracy to Commit Fraud (Feb. 28, 2020), https://www.sfo.gov.uk/2020/02/28/former-barclays-executives-acquitted-of-conspiracy-to-commit-fraud/.
[649] *Former Barclays Executives Cleared of Fraud Charges*, BBC NEWS (Feb. 28, 2020), https://www.bbc.co.uk/news/business-51673470#:~:text=The%20Serious%20Fraud%20Office%20(SFO,jury%20in%20under%20six%20hours.&text=Mr%20Boath%20said%20the%20last%20six%20years%20had%20been%20tough.
[650] House of Commons, Serious Fraud Office Annual Report and Accounts 2019-20 (July 22, 2020), https://www.sfo.gov.uk/2020/07/22/sfo-annual-report-and-accounts-2018-2019-2/.
[651] SFO News Release, SFO Closes Investigation into De La Rue Plc (June 16, 2020), https://www.sfo.gov.uk/2020/06/16/sfo-closes-investigation-into-de-la-rue/.
[652] Lisa Osofsky, Director of SFO, Address to the Cambridge Symposium on Economic Crime (Sept. 7, 2020), https://www.sfo.gov.uk/2020/09/07/lisa-osofsky-speaking-at-a-presentation-hosted-by-the-cambridge-symposium-on-economic-crime/.
[653] HM Crown Prosecution Service Inspectorate, SFO Response to COVID-19: 16 March to 8 May 2020 (July 30, 2020), https://www.justiceinspectorates.gov.uk/hmcpsi/inspections/sfo-response-to-covid-19-16-march-to-8-may/.
[654] James Thomas, *SFO Suffers Coronavirus Slowdown*, GLOBAL INVESTIGATIONS REVIEW (May 15, 2020), https://globalinvestigationsreview.com/fraud/sfo-suffers-coronavirus-slowdown.

documents under Section 2 of the Criminal Justice Act 1987 (s2 Notices), whereas in a typical year the SFO issues hundreds of s2 Notices.[655]

a. DPAs

In 2020, the SFO entered into DPAs with Airbus SE and Airline Services Limited, both in relation to failure to prevent bribery offenses (s7 Bribery Act 2010). The Airbus resolution stands out due to the scale of the financial settlement (for the United Kingdom, €983.97 million ($1.2 billion) plus costs). The SFO Director highlighted the Airbus case as a particularly striking example of the SFO representing a good return on investment for the UK government—indeed, in the past four years the SFO has secured over £1.5 billion ($2 billion), mostly through DPAs.[656] The case also has provided a blueprint for the SFO for future multi-jurisdictional resolutions, and was notable for the way in which the SFO and French authorities divided jurisdictions of interest between them, demonstrating a commitment to cross-border anti-corruption cooperation. Investigations into individuals connected to the Airbus investigation are ongoing.

The Airline Services DPA was significantly smaller than Airbus, with a financial penalty of £1.2 million ($1.62 million) and disgorgement of £990,971 ($1.3 million), plus payment of the SFO's costs. The case is significant in that it was the third DPA secured by the SFO in 2020, up from two in 2019, and an average of one-per-year from 2015 to 2018. This sustained increase suggests that the SFO is becoming more adept at securing negotiated resolutions in corporate investigations.

Although related to fraud offences, the G4S DPA is significant given that it imposed strict obligations on the company to periodically assess its compliance policies and report to a third-party reviewer. Although the measures are still some way from a US-style independent compliance monitorship, this DPA is a step in that direction.

b. Civil Recovery

The SFO's recoveries have not been restricted to DPAs. It also secured the civil recovery of £1.2 million ($1.6 million) of suspected criminal assets from Julio Faerman, who admitted paying bribes on behalf of SBM Offshore NV, conduct that was uncovered through "Operation Car Wash" in Brazil.[657] The National Crime Agency (NCA) has also stepped up its recovery of the proceeds of crime, including those related to corruption, primarily by making extensive use of Account Freezing and Forfeiture Orders.[658] In 2019 to 2020, the NCA froze over £145 million ($196 million) in assets,

[655] SFO Response to Freedom of Information Request, No. 2019-092 (July 2019).
[656] Lisa Osofsky, Director of SFO, Address to the Cambridge Symposium on Economic Crime (Sept. 7, 2020), https://www.sfo.gov.uk/2020/09/07/lisa-osofsky-speaking-at-a-presentation-hosted-by-the-cambridge-symposium-on-economic-crime/.
[657] SFO News Release, SFO Investigation into West London Property Secures £1.2m (Nov. 12, 2020), https://www.sfo.gov.uk/2020/11/12/sfo-secures-1-2m-following-investigation-into-west-london-property-linked-to-brazilian-bribery-scandal/.
[658] Criminal Finances Act 2017, c. 22, § 16 (UK).

and recovered over £10 million ($13.5 million), up from £64.2 million ($86.8 million) and £5.9 million ($7.9 million) in 2018 to 2019, respectively.[659]

c. Unaoil

The SFO achieved success in the first criminal trial arising out of its Unaoil probe, which concluded in summer 2020. Ziad Akle and Stephen Whiteley, former Unaoil territory managers for Iraq, were convicted of conspiracy offenses under the Criminal Law Act 1977 and the Prevention of Corruption Act 1906, receiving sentences of imprisonment of five and three years, respectively. An additional defendant, Paul Bond, former sales manager at SBM Offshore, faces retrial in January 2021 and another, Basil Al Jarah, former Unaoil country manager for Iraq, pleaded guilty in 2019 to paying $17 million in bribes to secure $1.7 billion of contracts in Iraq, and received a sentence of imprisonment of three years and four months.[660]

Set against these successes are a number of controversies that have arisen in connection with the Unaoil probe. There have been reports of a fallout between the DOJ and the SFO over which agency was taking the lead in relation to key suspects.[661] Further details of this dispute came out in 2020 in the employment tribunal hearing of Tom Martin, former SFO Case Controller for the Unaoil investigation. Martin has alleged that complaints made against him during his time as Case Controller were motivated by a joint desire from Saman Ahsani, former Unaoil Chief Operating Officer, and the DOJ to have him removed from his post. Finally, there were significant concerns raised about contact between the Director of the SFO and a suspect's agent. In September 2018, an agent, acting unofficially for the Ahsani family, contacted the Director and offered to obtain guilty pleas from two individuals under investigation.[662] This offer was part of an effort by the agent to persuade the SFO to withdraw its arrest warrants for three Ahsani family members, leaving them free to pursue a plea deal in the United States. At a hearing in January 2020, Ziad Akle applied to have his case dismissed on the basis that these communications had breached his right to a fair trial. The judge dismissed the application, but criticized the Director's conduct, stating that the events should be comprehensively reviewed by the SFO. In July 2020, the SFO announced that it would appoint an independent counsel to lead a review, but that this review would not commence until after the retrial of Paul Bond.[663]

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[659] National Crime Agency, Annual Report and Accounts 2019-20 (July 21, 2020), https://www.nationalcrimeagency.gov.uk/who-we-are/publications/467-national-crime-agency-annual-report-and-accounts-2019-20/file; National Crime Agency, Annual Report and Accounts 2018-19 (July 22, 2019), https://www.nationalcrimeagency.gov.uk/who-we-are/publications/329-nca-annual-report-accounts-2018-19/file.
[660] SFO News Release, Former Unaoil Executive Sentenced for Paying Bribes to Win $1.7bn Worth of Contracts (Oct. 8, 2020), https://www.sfo.gov.uk/2020/10/08/former-unaoil-executive-sentenced-for-paying-bribes-to-win-1-7bn-worth-of-contracts-in-post-occupation-iraq/.
[661] Rob Evans & David Pegg, *'We look like fools': UK-US ties threatened by corruption case row*, THE GUARDIAN (July 23, 2020), https://www.theguardian.com/law/2020/jul/23/we-look-like-fools-uk-us-ties-threatened-by-corruption-case-row.
[662] Kate Beioley, *SFO to Probe Director's Conduct over Contact with 'Freelance Agent' During Bribery Probe*, FINANCIAL TIMES (July 13, 2020), https://www.ft.com/content/8d235cc9-f039-4623-8928-d5e32bec1c04.
[663] Kate Beioley, *Attorney-general Censured for Shunning Probe into SFO Head*, FINANCIAL TIMES (July 14, 2020), https://www.ft.com/content/7abc0011-f391-439b-8d88-041e5e9ec576.

Notwithstanding the guilty pleas obtained by the SFO in the Unaoil case, the SFO closed its related investigation into ABB Ltd and the Unaoil-linked strands of its investigation into KBR Ltd..[664] A "separate and discrete" investigation of KBR is ongoing and the case of *R (on the application of KBR, Inc) v. Director of the Serious Fraud Office* was heard in the Supreme Court in October 2020.[665] This case was a judicial review of the SFO's s2 Notice powers to require the production of documents, which is one of the SFO's most powerful and widely used investigative tools. In 2017, the SFO issued an s2 Notice against KBR's American parent company regarding documents held outside the United Kingdom. KBR appealed the notice, arguing that s2 Notices do not have extraterritorial application. In September 2018, the High Court dismissed KBR's appeal and the case was appealed to the Supreme Court. At the time of writing the Supreme Court's judgment has not yet been handed down. Whatever the outcome, the case will have a significant bearing on the extent of the SFO's investigatory powers and its ability to effectively investigate cases of bribery and corruption.

Looking ahead, there are a number of potentially significant corruption cases and investigations on the horizon. The SFO opened an investigation into GPT Special Project Management Ltd in 2012, and in July 2020, it charged the company and three individuals with corruption offenses.[666] One of the individuals, the former managing director of GPT, is also charged with misconduct in public office. Also of note, in November 2020, the SFO opened a corruption investigation into the Canadian company Bombardier Inc. regarding suspected bribery offenses relating to contracts with the Indonesian airline, Garuda.[667] Finally, in December 2020, Merseyside Police arrested the Mayor of Liverpool on suspicion of bribery offenses in relation to the awarding of construction contracts,[668] a case that attracted significant media attention. How quickly these cases will progress in 2021 remains unclear. The COVID-19 pandemic has exacerbated the court system's pre-existing backlog of criminal cases, with trials now delayed into 2022.[669]

B. Germany

1. Legislative and Policy Developments

In 2018, the OECD Working Group on Bribery (the Working Group) raised concerns regarding the effectiveness of prosecutions against corporations in Germany. The Working Group noted that only one out of four companies was held liable in foreign corruption cases and recommended that a

[664] SFO News Release, SFO Closes its Investigation into ABB Ltd (May 19, 2020), https://www.sfo.gov.uk/2020/05/19/sfo-closes-its-investigation-into-abb-ltd/.
[665] *R (on the application of KBR, Inc) v. Director of the Serious Fraud Office* [2020] UKSC 2018/0215 (Oct. 14, 2020, Morning session), https://www.supremecourt.uk/watch/uksc-2018-0215/141020-am.html.
[666] SFO News Release, SFO Charges GPT and Three Individuals Following Corruption Investigation (July 30, 2020), https://www.sfo.gov.uk/2020/07/30/sfo-charges-gpt-and-three-individuals-following-corruption-investigation/.
[667] SFO News Release, SFO Confirms Investigation into Bombardier (Nov. 5, 2020), https://www.sfo.gov.uk/2020/11/05/sfo-confirms-investigation-into-bombardier/.
[668] *Liverpool Mayor Joe Anderson Arrested in Bribery Probe*, BBC NEWS (Dec. 5, 2020), https://www.bbc.co.uk/news/uk-england-merseyside-55192375.
[669] John Hyde, *Trials Listed for 2022 as Crown Court Backlog Approaches 50,000,* THE LAW SOCIETY GAZETTE (Oct. 9, 2020), https://www.lawgazette.co.uk/news/trials-listed-for-2022-as-crown-court-backlog-approaches-50000/5105956.article.

legal framework be developed to prosecute corporate offenses.[670] In response to the Working Group's criticisms, the German government parties in 2018 agreed to reform, if necessary, the sanctioning laws for corporations in order to combat corporate offenses more efficiently.[671]

In June 2020, the German Federal Government published a draft bill, the German Corporate Criminal Liability Act (*Verbandssanktionengesetz*) (the proposed Criminal Liability Act).[672] Under current law, corporate offenses may only be sanctioned under the Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz*), which grants authorities wide power of discretion as to whether or not to initiate an investigation and to impose a fine. This means that in practice, cases in which companies have been sanctioned are rare.[673] The proposed Criminal Liability Act changes the existing sanctioning of corporations by, *inter alia*, introducing the principle of legality (which would obligate authorities to initiate investigations against corporations in the event of an initial suspicion of misconduct) and potentially higher fines. In particular, the proposed Act:

- makes the prosecution of corporate offenses mandatory if there are sufficient factual indications that an offense has been committed;[674]
- expands the range of prosecutable corporate offenses by including corporate offenses committed by non-German citizens outside of Germany, under certain conditions;[675]
- increases possible sanctions against corporations:
    - under the proposed Criminal Liability Act, corporations can be (1) issued a monetary fine[676] of up to 10% of the annual group turnover;[677] or (2) warned, with the government reserving the right to later charge a fine[678] (in such cases, courts may issue conditions or instructions);[679]

[670] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report: Germany, at 67 and 84 *et seq.* (2018), https://www.oecd.org/corruption/anti-bribery/Germany-Phase-4-Report-ENG.pdf.
[671] Coalition agreement between CDU, CSU and SPD for the 19th legislative session, *Ein neuer Aufbruch für Europa, eine neue Dynamik für Deutschland, ein neuer Zusammenhalt für unser Land*, at 126 (Mar. 2018).
[672] German Federal Government, *Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft* (June 16, 2020) (the Proposed Criminal Liability Act), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Staerkung_Integritaet_Wirtschaft.pdf;jsessionid=21A6910CD65AEA90D3670C425452C894.1_cid289?__blob=publicationFile&v=2. The proposed Criminal Liability Act mirrored a draft published by the Federal Ministry of Justice and Consumer Protection in April 2020, with few changes. *Cf.* Federal Ministry of Justice and Consumer Protection, *Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz: Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft* (Apr. 20, 2020), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Staerkung_Integritaet_Wirtschaft.pdf;jsessionid=21A6910CD65AEA90D3670C425452C894.1_cid289?__blob=publicationFile&v=1.
[673] Administrative Offenses Act (*Ordnungswidrigkeitengesetz)*, § 47 (1).
[674] *See* Proposed Criminal Liability Act, §§ 24(1), 152(2); Code of Criminal Procedure (*Strafprozessordnung*) § 170(1); *see* Proposed Criminal Liability Act, at 59 (for the reasoning for the Act).
[675] *See* Proposed Criminal Liability Act § 2(2) (if, among other things the misconduct were a criminal offense under German law and under the law of the country where it was committed, and the company has a registered office in Germany at the time of the conduct); *id.* at 76 *et seq.* (for the reasoning of the proposed Criminal Liability Act). The prerequisites are currently under discussion. *See* BR-Drucks. 440/20.
[676] Proposed Criminal Liability Act § 8 (No. 1).
[677] Proposed Criminal Liability Act § 9(2) (No. 1); *see id.* at 57 (for the reasoning of the proposed Act).
[678] Proposed Criminal Liability Act § 8 (No. 2).
[679] *See* Proposed Criminal Liability Act §§ 12-13.

    - corporate offenses may also be announced publicly (naming and shaming)[680] or recorded in an administrative register,[681] and profits obtained through the corporate offense may be seized;[682]
- introduces incentives for corporations to implement compliance measures (such as compliance management systems) and to conduct thorough internal investigations:
    - compliance measures can be taken into account when imposing the type[683] and amount of the sanction[684] and whether parts of the sanction may be reserved;[685]
    - internal investigations can reduce the fine by 50%[686] and exclude public announcements,[687] and court proceedings may also be completely avoided;[688] and
- allows the public prosecutor and the police after a court order to seize documents which were produced during the investigation but not used for corporate defense.[689]

Businesses and politicians alike criticized the proposed Criminal Liability Act during the legislative procedure.[690] Grounds of criticism raised were, for example, a disproportionate burden on medium-sized or small companies or insufficient regulations on compliance requirements. The German Federal Council also recommended changes to the proposed Criminal Liability Act to reduce the burden on smaller and medium-sized corporations and introduce further requirements for corporate offenses committed outside of Germany.[691] The German Federal Government commented on the proposed changes by the German Federal Council and submitted the proposed Criminal Liability Act to the German Federal Parliament to continue the legislative process.[692] Now that the German Federal Government has introduced the draft into the German Federal Parliament in October 2020, thus initiating the final phase of the legislative process, it can be expected that the law will be passed in 2021. Two years thereafter, the act will come into force in order to give authorities the opportunity to take organizational measures and to give corporations sufficient time to review their internal procedures and, if necessary, take further compliance measures.

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[680] Proposed Criminal Liability Act § 14.
[681] *See* Proposed Criminal Liability Act § 54.
[682] *See* Proposed Criminal Liability Act, at 57, 77 (for the reasoning of the proposed Act).
[683] *Cf.* Proposed Criminal Liability Act §§ 10(1) (No. 1, No. 2); *see id.* at 79 (for the reasoning of the proposed Act).
[684] Proposed Criminal Liability Act §§ 15(3) (No. 6, No. 7); *see id.* at 79 (for the reasoning of the proposed Act).
[685] Proposed Criminal Liability Act § 11(1).
[686] *See* Proposed Criminal Liability Act §§ 16-18.
[687] Proposed Criminal Liability Act § 18.
[688] Proposed Criminal Liability Act § 50.
[689] *See* Proposed Criminal Liability Act, at 136 *et seq.* (for the reasoning of the proposed Criminal Liability Act).
[690] Dietmar Neuerer, *Koalition streitet über Gesetz zu Konzernstrafrecht,* HANDELSBLATT (Sept. 20, 2020), https://www.handelsblatt.com/politik/deutschland/unternehmenskriminalitaet-koalition-streitet-ueber-gesetz-zu-konzernstrafrecht/26201594.html?ticket=ST-3534724-9KLcQlzSQZ6USLfzlOEX-ap6.
[691] German Federal Council, *Stellungnahme des Bundesrates: Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft,*BR-Drs 440/20 (Beschluss) (Sept. 18, 2020), https://www.bundesrat.de/SharedDocs/drucksachen/2020/0401-0500/440-20(B).pdf?__blob=publicationFile&v=1.
[692] German Federal Government, *Gesetzentwurf der Bundesregierung: Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft*, BT-Drucks. 19/23568, at 4, 151 *et seq.* (Oct. 21, 2020), https://dip21.bundestag.de/dip21/btd/19/235/1923568.pdf.

In September 2020, a draft bill for a mandatory lobby register (*Lobbyregistergesetz*) (proposed Lobbying Registration Act) was introduced by the government parties.[693] The so-called Azerbaijan affair, discussed below, contributed to the push to tighten controls around lobbying in Germany.[694] At the moment in Germany, there is only a voluntary register for associations that lobby for the German Federal Parliament or the German Federal Government. The proposed Lobbying Registration Act intends to discourage cases of corruption by ensuring transparency and democratic accountability, while providing a better basis for a vigilant public.[695] The proposed Lobbying Registration Act is applicable to anyone representing interests vis-à-vis the German Federal Parliament, its members, or parliamentary groups under certain circumstances.[696] Stakeholders will be obliged to disclose information, including their names and activities, whose interests they represent, and certain grants, subsidies, or donations.[697] The proposed Lobbying Registration Act was removed from the German Federal Parliament's agenda from October and the Minister of Justice and Consumer Protection suggested further amendments regarding the design of the planned lobby register.[698] If passed, the proposed Lobbying Registration Act would be effective in April 2021.[699]

Another legislative development concerns a supply chain law, mandating companies to conduct human rights due diligence in their supply chains. In their coalition agreement from March 2018, the current government parties agreed to take action if voluntary due diligence in the supply chain is insufficient to consistently implement the National Action Plan on Business and Human Rights (NAP).[700] The NAP describes a wide catalogue of measures by the German Government to uphold the state's duty to protect human rights, particularly in the business context.[701] According to a 2020 survey of Germany companies, fewer than half had sufficient human rights due diligence in place.[702] In mid-June, the German Federal Government announced the finalization of a new German Draft Bill Supply Chain (*Lieferkettengesetz*) (Draft Supply Chain Act) in this legislative session.[703] The Draft Supply Chain Act would apply to companies located in Germany with more

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[693] CDU/CSU and SPD, *Entwurf eines Gesetzes zur Einführung eines Lobbyregisters beim Deutschen Bundestag und zur Änderung des Gesetzes über Ordnungswidrigkeiten (Lobbyregistergesetz),* BT-Drucks. 19/22179 (Sept. 8, 2020) (the Proposed Lobbying Registration Act), https://dip21.bundestag.de/dip21/btd/19/221/1922179.pdf.
[694] Sabrina Winter, *Entwurf von Union und SPD: Das Lobbyregisterchen*, SPIEGEL (Sept. 11, 2020), https://www.spiegel.de/politik/deutschland/lobbyregister-fuer-deutschland-die-wichtigsten-fragen-und-antworten-a-76061d1e-7f83-4050-a6bc-baba64a489f8.
[695] *See* Proposed Lobbying Registration Act § 7 (for the reasoning of the proposed Act).
[696] Proposed Lobbying Registration Act § 1(1).
[697] Proposed Lobbying Registration Act § 2(1).
[698] *Union und SPD uneins über Lobbyregister*, FRANKFURT ALLGEMEINE ZEITUNG (Oct. 23, 2020), https://www.faz.net/aktuell/politik/inland/union-und-spd-uneins-ueber-lobbyregister-17016531.html.
[699] Proposed Lobbying Registration Act, Art. 3.
[700] Coalition agreement between CDU, CSU and SPD for the 19th legislative session from Mar. 2018, *Ein neuer Aufbruch für Europa, eine neue Dynamik für Deutschland, ein neuer Zusammenhalt für unser Land*, at 156.
[701] National Action Plan for Business and Human Rights, AUSWÄRTIGES AMT (Dec. 21, 2016), https://www.auswaertiges-amt.de/de/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/-/227580#:%7E:text=In%20adopting%20the%20National%20Action,2030%20Agenda%20for%20Sustainable%20Development.
[702] Federal Foreign Office, *Monitoring the National Action Plan for Business and Human Rights (NAP)* (Oct. 13, 2020), https://www.auswaertiges-amt.de/en/aussenpolitik/themen/aussenwirtschaft/wirtschaft-und-menschenrechte/monitoring-nap/2131054.
[703] Federal Ministry of Labor and Social Affairs and Federal Ministry for Economic Cooperation and Development Press Release, *Bundesminister Heil und Müller: "Jetzt greift der Koalitionsvertrag für ein Lieferketten-Gesetz. Ziel ist ein Abschluss noch in dieser Legislaturperiode"* (July 14, 2020),

than 500 employees. Those companies would have to conduct due diligence on their supply chains and implement appropriate measures to combat potential adverse effects on human rights.[704] The Draft Supply Chain Act has not yet been finalized by the German Federal Government, as the relevant Ministries disagree on certain points. The points that have been discussed and criticized include, for example, the implementation of the Draft Supply Chain Act for major companies with a large number of direct suppliers, legal barriers to impose requirements on business partners from EU countries on the basis of national law, and the transfer of legal and liability obligations from the government to private companies.[705]

Finally, the scandal around the German payment processor and financial services provider Wirecard has once again brought into focus the need to implement the EU Whistleblowing Directive[706] into German domestic law so that whistleblowers have more extensive protection under German law.[707] Germany has until December 16, 2021, to implement the EU Whistleblowing Directive; the German Federal Government intends to present a draft of the implementation act on time.[708]

2. Enforcement Efforts

Germany had several notable bribery and corruption-related investigations in 2020. In early 2020, Frankfurt public prosecutors investigated bribery and money laundering allegations surrounding the so-called Azerbaijan affair. Police raided several homes and offices in Germany and Belgium, including properties belonging to current and former members of the German Federal Parliament. A suspected key figure is a former member of the German Federal Parliament (MP) who allegedly received approximately €4 million ($4.9 million) from Azerbaijan between 2008 and 2016 and distributed those funds to members of the Council of Europe Parliamentary Assembly (PACE). In return, those members are said to have expressed pro-Azerbaijani comments in the media.[709]

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https://www.bmz.de/de/presse/aktuelleMeldungen/2020/juli/200714_pm_21_Bundesminister-Heil-und-Mueller_Jetzt-greift-der-Koalitionsvertrag-fuer-ein-Lieferketten-Gesetz_Ziel-ist-ein-Abschluss-noch-in-dieser-Legislaturperiode/index.html.

[704] This is reflected in an internal document drafted by the Federal Ministry for Economic Cooperation and Development and Federal Ministry of Labor and Social Affairs, *Entwurf für Eckpunkte eines Bundesgesetzes über die Stärkung der unternehmerischen Sorgfaltspflichten zur Vermeidung von Menschenrechtsverletzungen in globalen Wertschöpfungsketten (Sorgfaltspflichtengesetz)*, at 1 (Mar. 10, 2020), https://www.rph1.rw.fau.de/files/2020/06/key-points-german-due-diligence-law.pdf.

[705] Thorsten Mumme, *Warum das Lieferkettengesetz noch immer nicht ins Kabinett gekommen ist*, DER TAGESSPIEGEL (Oct. 12, 2020), https://www.tagesspiegel.de/wirtschaft/verantwortung-fuer-menschenrechte-warum-das-lieferkettengesetz-noch-immer-nicht-ins-kabinett-gekommen-ist/26263418.html; *cf.* also Zacharias Zacharakis, *Große Mehrheit der Bundesbürger für Lieferkettengesetz*, ZEIT (Sept. 15, 2020), https://www.zeit.de/wirtschaft/2020-09/umfrage-lieferkettengesetz-einhaltung-menschenrechte-unternehmen-cdu-peter-altmaier.

[706] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report on breaches of Union law, 2019 O.J. (L 305) 17.

[707] See WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 71 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.

[708] German Federal Parliament, *Antwort der Bundersregierung: auf die Kleine Anfrage der Abgeordneten Niema Movassat, Dr. André Hahn, Ulla Jelpke, weiterer Abgeordneter und der Fraktion DIE LINKE*, BT-Drucks. 19/21941, at 2 (Aug. 28, 2020), https://dip21.bundestag.de/dip21/btd/19/219/1921941.pdf.

[709] Claudia von Salzen, *Staatsanwälte werfen CDU-Politikerin Strenz Bestechlichkeit vor*, DER TAGESSPIEGEL (Jan. 30, 2020), https://www.tagesspiegel.de/politik/buero-im-bundestag-durchsucht-staatsanwaelte-werfen-cdu-politikerin-strenz-bestechlichkeit-vor/25490730.html; *Razzia gegen Unionspolitiker wegen Bestechungsverdachts*, FRANKFURTER ALLGEMEINE ZEITUNG (Jan. 30, 2020),

Further, another MP is suspected to have received at least €22,000 ($26,966) from Azerbaijan through a lobbying firm.[710] According to press reports, the MP maintained a pro-Azerbaijan position in the PACE.[711] The German Federal Parliament authorized a raid of the office of the MP in question and revoked his parliamentary immunity.[712] Frankfurt public prosecutors are continuing to investigate the Azerbaijan affair.[713] In July 2020, in a different case also involving a member of the German Federal Parliament, the Berlin Public Prosecutor's Office ended proceedings for bribery and corruption of public officials against another MP after the prosecutors failed to uncover any evidence of wrongdoing in connection with his receipt of unreported stock options from a US-based information technology company.[714]

Also in July, a senior public prosecutor in the Frankfurt Public Prosecutor's Office, who was responsible for prosecuting corruption cases in the healthcare sector, was arrested on suspicion of corruption.[715] A former friend of the senior public prosecutor founded a company in 2005 that provided expert opinions to judicial authorities, generating more than €12.5 million ($15.3 million) from these orders. The senior public prosecutor's friend opened an account for the payments the senior public prosecutor received as a bribe for hiring the company. Over a five-year period between 2015 and 2020, the senior public prosecutor allegedly received kickback payments of at least €300,000 ($367,724) for such appraisal orders. In September 2020, the senior public prosecutor confessed to the allegations in part; his trial has not yet begun.[716]

C. France

1. Legislative and Policy Developments

In 2020, there were various legislative and policy developments in France. The most notable development related to the reversal of a long-standing legal principle by the French Supreme Court (*Cour de Cassation*) as regards the acquiring entity's liability for the past conduct of the acquired company. Until now, legal and natural persons could be held liable for their own actions. Thus, if

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https://www.faz.net/aktuell/politik/inland/aserbaidschan-lobby-razzia-gegen-unionspolitiker-strenz-und-lintner-wegen-bestechungsverdachts-16608568.html.

[710] Will Barbieri, *Prosecutors Raid German Politicians' Homes in Money Laundering Probe*, GLOBAL INVESTIGATIONS REVIEW (Jan. 31, 2020), https://globalinvestigationsreview.com/article/1213863/prosecutors-raid-german-politicians%E2%80%99-homes-in-money-laundering-probe.

[711] *Razzia gegen Unionspolitiker wegen Bestechungsverdachts*, FRANKFURTER ALLGEMEINE ZEITUNG (Jan. 30, 2020), https://www.faz.net/aktuell/politik/inland/aserbaidschan-lobby-razzia-gegen-unionspolitiker-strenz-und-lintner-wegen-bestechungsverdachts-16608568.html.

[712] German Federal Parliament, *Beschlussempfehlung des Ausschusses für Wahlprüfung, Immunität und Geschäftsordnung (1. Ausschuss): Antrag auf Genehmigung zum Vollzug gerichtlicher Durchsuchungs- und Beschlagnahmebeschlüsse*, BT-Drucks. 19/16920 (Jan. 30, 2020), https://dip21.bundestag.de/dip21/btd/19/169/1916920.pdf.

[713] *Transparency enttäuscht über eingestelltes Amthor-Verfahren*, SÜDDEUTSCHE ZEITUNG (July 23, 2020), https://www.sueddeutsche.de/politik/parteien-berlin-transparency-enttaeuscht-ueber-eingestelltes-amthor-verfahren-dpa.urn-newsml-dpa-com-20090101-200723-99-902697.

[714] *Verfahren gegen Philipp Amthor eingestellt*, ZEIT (July 22, 2020), https://www.zeit.de/politik/deutschland/2020-07/philipp-amthor-lobby-affaere-staatsanwaltschaft-bestechlichkeit-ermittlungen-eingestellt?utm_referrer=https%3A%2F%2Fwww.google.com%2F.

[715] Timo Steppat, *War der Korruptionsjäger selbst korrupt?*, FRANKFURTER ALLGEMEINE ZEITUNG (Aug. 6, 2020), https://www.faz.net/aktuell/politik/inland/hessens-justizministerin-zu-korruptionsskandal-frankfurt-16892789.html

[716] René Bender, *Korrupter Oberstaatsanwalt kommt aus der Untersuchungshaft frei,* HANDELSBLATT (Sept. 20, 2020), https://www.handelsblatt.com/finanzen/steuern-recht/recht/justizskandal-in-hessen-korrupter-oberstaatsanwalt-kommt-aus-der-untersuchungshaft-frei/26201342.html.

they ceased to exist, any criminal proceedings against them would be withdrawn. However, in November 2020, the Court ruled that an acquiring company may be held liable for illicit acts committed by the company it has acquired, even where these acts were committed before the acquisition.[717] As a result, Agence Française Anticorruption (AFA) will be required to update accordingly its guidelines on anti-corruption due diligence for mergers and acquisitions.[718] The Court also held that entities found to have engaged in a merger or acquisition for the purpose of helping another company to evade prosecution can be charged with fraud under French law.

AFA is increasingly focused on cross-border cooperation. In May 2020, AFA, in partnership with the OECD, GRECO and other agencies launched a global mapping of anti-corruption authorities.[719] The project sought to collect information that (i) would enable more effective cooperation between national anti-corruption authorities, and (ii) would help practitioners to better understand those authorities' characteristics and needs.

Another development is the first National Analysis (*Diagnostic national*),[720] issued by AFA in September 2020. The National Analysis asked thousands of companies, large and small, to analyze their compliance with Article 17 of Sapin Law II,[721] which requires French companies to implement internal anti-corruption measures and procedures.

The vast majority of companies that participated in the National Analysis indicated that they were aware of various potential corruption issues and that they understood the difference between direct versus indirect bribery. According to the National Analysis, 70% of participating companies have set up anti-corruption compliance systems, in compliance with AFA guidelines. However, AFA regarded many of these anti-corruption systems as incomplete. Although the vast majority of participating companies have implemented a code of conduct, only half have the following: a compliance officer, a risk mapping procedure, a third-party evaluation procedure, a training and prevention framework, and an internal warning or control system. Medium-sized companies seem to be lagging behind larger companies in designing and rolling out a compliance program due to lack of human and financial resources and expertise.

In the same vein, in October 2020, AFA launched a public consultation on the draft recommendations aimed at assisting all public and private law legal entities to comply with Sapin Law II.[722] The first set of recommendations was published in December 2017, covering various

[717] Cour de cassation, chambre criminelle, arrêt n°2333 du 25 novembre 2020 (18-86.955).
[718] Agence Française Anticorruption, *Guide pratique - Les verifications anticorruption dans le cadre des fusions-acquisitions* (Jan. 2020), https://www.agence-francaise-anticorruption.gouv.fr/files/files/Guide%20pratique%20fusacq.pdf.
[719] AFA/GRECO/OECD/NCPA, Global Mapping of Anti-Corruption Authorities Analysis Report (May 2020), https://www.agence-francaise-anticorruption.gouv.fr/files/files/NCPA_Analysis_Report_Global_Mapping_ACAs.pdf.
[720] Agence Française Anticorruption, *Diagnostic national sur les dispositifs anticorruption dans les entreprises* (Sept. 21, 2020), https://www.agence-francaise-anticorruption.gouv.fr/files/2020-09/Diagnostic%20national%20sur%20les%20dispositifs%20anticorruption%20dans%20les%20entreprises.pdf.
[721] Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique, Publiées au Journal officiel du 10 Décembre 2016, Texte 2 sur 146.
[722] Agence Française Anticorruption, Recommandations de l'AFA: vers un référentiel anticorruption français (Oct. 16, 2020), https://www.agence-francaise-anticorruption.gouv.fr/fr/recommandations.

compliance procedures, including internal whistleblowing systems and accounting control procedures.[723] For an in-depth discussion on Sapin Law II, see our 2019 Global Anti-Bribery Year-in-Review.[724]

Also in September 2020, the French financial markets regulator published Q&A guidance[725] for service providers in digital assets, such as cryptocurrencies, as established by a recent law.[726] The regime mandates registration with the regulator for the custody of digital assets or access to digital assets on behalf of third parties, and for the purchase/sale of digital assets. The Q&A also outlines provider obligations in relation to fighting money laundering and terrorist financing, as well as in relation to the verification of customers' identity.

Lastly, a prominent French legal think tank issued a report suggesting that Sapin Law II should serve as a model for an EU-wide anti-corruption policy.[727] In particular, the report suggests the enactment of a package of EU directives that would compel EU Member States (i) to incriminate corruption linked to their country, even if the misconduct is committed abroad, and (ii) to oblige large undertakings to implement internal prevention and compliance systems. In addition, the report suggests that the European Public Prosecutor's Office (EPPO) be empowered to cover all acts of foreign corruption, essentially turning the EPPO into an EU version of the US DOJ. Finally, the report discusses the possibility of extending the scope of Conventions Judiciaires d'Intérêt Public (CJIPs)—the French equivalents of DPAs—to individuals and to economic offenses other than corruption in the future.

2. Enforcement Efforts

One of the most notable French cases of 2020 concerned the €2.1 billion ($2.57 billion) settlement CJIP agreement concluded between the aircraft manufacturer Airbus and the PNF in January 2020.[728] The investigation related to corruption and bribery charges under the French Criminal Code.[729] From 2004 to 2016, Airbus used intermediaries to bribe foreign public officers with decision-making powers in China, Colombia, Nepal, South Korea, the United Arab Emirates, Saudi

[723] Agence Française Anticorruption, Recommandations de l'Agence française anticorruption destinées à aider les personnes morales de droit public et de droit privé à prévenir et à détecter les faits de corruption, de trafic d'influence, de concussion, de prise illégale d'intérêt, de détournement de fonds publics et de favoritisme (Dec. 2017), https://www.agence-francaise-anticorruption.gouv.fr/files/2018-10/2017_-_Recommandations_AFA.pdf.
[724] WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020* (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020#:~:text=Enforcement%20activity%20reached%20new%20heights,last%20year's%20near%2Drecord%20level.
[725] Autorité des Marchés Financiers, Actifs numériques: l'AMF détaille ses attentes aux candidats à l'enregistrement ou à l'agrément de PSAN (Sept. 22, 2020), https://www.amf-france.org/fr/actualites-publications/communiques/communiques-de-lamf/actifs-numeriques-lamf-detaille-ses-attentes-aux-candidats-lenregistrement-ou-lagrement-de-psan.
[726] *See Plan d'Action pour la Croissance et la Transformation des Entreprises*, also known as the *Loi Pacte,* Loi n° 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises, Journal officiel n°0137 du15 juin 2019.
[727] Le Club des Juristes, *Rapport - Pour un droit européen de la compliance* (Nov. 2020), https://www.leclubdesjuristes.com/wp-content/uploads/2020/11/compliance_FR_def_WEB.pdf.
[728] Convention Judiciaire d'Intérêt Public entre le Procureur de la République Financier près le tribunal judiciaire de Paris et la société Airbus SE, Ref. PNF 16 159 000 839 (Jan. 29, 2020).
[729] Articles 445-11 and 445-33.

Arabia, Taiwan, and Russia, in order to secure various businesses, resulting in profit over 1 billion Euros. France launched its investigation of Airbus in 2016, and the settlement is part of a global agreement with the US and UK authorities, as discussed above in further detail.[730]

AFA acknowledged that Airbus had worked from 2015 to 2019 to develop and implement a compliance program, including a code of conduct, an internal warning system, a risk-mapping process, third party due diligence, a compliance training program, and an employee discipline framework. Under the settlement agreement Airbus is required to provide verifications to national authorities for the next three years that the compliance program works effectively.

D. The European Union

1. Legislative and Policy Developments

In July 2020, the European Commission (Commission) recommended that EU Member States not provide financial support to companies with links to countries that are on the EU's list of non-cooperative tax jurisdictions,[731] or to those that have previously been convicted of fraud and corruption.[732]

In September 2020, the Commission issued its first EU-wide report on the rule of law, demonstrating that many EU Member States have high rule of law standards; but significant challenges still exist in the EU.[733] The Commission found that several Member States have adopted comprehensive anti-corruption strategies, while others are in the process of preparing such strategies. The Commission has also increasingly discussed the independence of prosecution with regard to the executive as it has important implications for the capacity to fight crime and corruption.

2. Enforcement Efforts

In July 2020, the Council of the European Union appointed the first 22 European prosecutors, which together with the European Chief Prosecutor, now constitute the EPPO. The EPPO will primarily be responsible for investigating and prosecuting criminal offenses affecting the EU's financial interests.[734] The prosecutors have been nominated by the EU Member States participating in the EPPO.[735] European prosecutors are appointed for a non-renewable term of six years, which

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[730] *See supra* at pp. 36-38.
[731] The revised EU list of non-cooperative jurisdictions is available at https://ec.europa.eu/taxation_customs/news/council-revises-its-eu-list-non-cooperative-jurisdictions-4_en.
[732] European Commission Press Release No. IP/20/1332, State Aid: Commission recommends not granting financial support to companies with links to tax havens (July 14, 2020).
[733] European Commission Press Release No. IP/20/1756, Rule of law: First Annual Report on the Rule of Law situation across the European Union (Sept. 30, 2020).
[734] Council of the European Union Press Release No. 515/20, EU Public Prosecutor's Office (EPPO): Council appoints European prosecutors (July 27, 2020), https://www.consilium.europa.eu/en/press/press-releases/2020/07/27/eu-public-prosecutor-s-office-eppo-council-appoints-european-prosecutors/.
[735] There are currently 22 member states participating in the EPPO, namely Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovenia, Slovakia, and Spain. Denmark, Ireland, Hungary, Poland, and Sweden have so far refused to join.

can be extended for a maximum of three years by the Council of the European Union.[736] The Council's agenda includes the adoption of several rules, policies, and procedures, that will allow EPPO to commence its investigative work.

3. Anti-money Laundering Developments

Throughout the year, there have been various developments in relation to anti-money laundering in the EU. Anti-money laundering has been declared as a priority by the Commission.[737] Most importantly, the Commission has strongly focused on the implementation of the 4th Anti-Money Laundering Directive (AMLD4),[738] and has also obligated EU Member States to transpose the 5th Anti-Money Laundering Directive (AMLD5)[739] by January 10, 2020.[740] Also, the European Anti-Fraud Office (OLAF) has participated in hundreds of investigations in 2020, uncovering various fraudulent and money laundering schemes.[741]

[736] However, as part of the transitional rules for the first mandate following the creation of the EPPO, the European prosecutors from one third of the member states, determined by drawing lots, namely Greece, Spain, Italy, Cyprus, Lithuania, Netherlands, Austria and Portugal, will hold a three year non-renewable mandate.
[737] Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing, C(2020) 2800 final (May 7, 2020). This Action Plan builds on six pillars: (i) effective implementation of existing rules; (ii) a single EU rulebook; (iii) EU-level supervision; (iv) a support and cooperation mechanism for financial intelligence units; (v) better use of information to enforce criminal law; and (iv) a stronger EU presence in the world. The Commission intends to deliver these actions by early 2021, a development welcomed by the Council of the European Union.
[738] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, 2015 O.J. (L 141) 73. The Commission has referred several EU Member States for failing to fully implement AMLD4 into their national law. *See* European Commission Press Release No. IP/20/1228, Anti-Money Laundering: Commission Decides to refer Austria, Belgium and the Netherlands to the Court of Justice of the EU for Failing to Fully Implement EU Anti-money Laundering Rules (July 2, 2020). Additionally, in September 2020, the Commission issued a report assessing whether EU Member States have duly identified and made subject to the obligations imposed by AMLD4 all trusts and similar legal arrangements governed under their laws, concluding that there is a lack of common approach. *See* Report from the Commission to the European Parliament and the Council Assessing whether Member States Have Duly Identified and Made Subject to the Obligations of Directive (EU) 2015/849 all Trusts and Similar Legal Arrangements Governed under Their Laws, COM(2020) 560 final (Sept. 16, 2020).
[739] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, 2018 O.J. (L 156) 43.
[740] The amendments imposed by AMLD5 include: (i) enhancing transparency by setting up publicly available registers for companies, trusts, and other legal arrangements; (ii) enhancing the powers of EU Financial Intelligence Units, and providing them with access to broad information for the carrying out of their tasks; (iii) limiting the anonymity related to virtual currencies and wallet providers, but also for pre-paid cards; (iv) broadening the criteria for the assessment of high-risk third countries and improving the safeguards for financial transactions to and from such countries; (v) setting up central bank account registries or retrieval systems in all Member States; and (vi) improving the cooperation and enhancing of information between anti-money laundering supervisors between them and prudential supervisors and the European Central Bank.
[741] One of the most notable operations—*Operation Daphne*—led by the Italian Customs and Monopolies Agency and OLAF, together with support from other EU agencies, uncovered more than 500 cases of undeclared and opaque cash flows. The vast majority of investigations involved air traffic and concerned passengers travelling to/from outside the EU. In total, the investigation identified €17 million in illicit cash flow. *See* European Anti-Fraud Office Press Release No. 28/2020, Operation Daphne: €17 million in illicit cash flows uncovered in one week (Oct. 23, 2020), https://ec.europa.eu/anti-fraud/media-corner/news/23-10-2020/operation-daphne-eu17-million-illicit-cash-flows-uncovered-one-week_en.

E. Switzerland

1. Legislative Developments

In November 2020, the Swiss Federal Council adopted the Federal Act on the Tax Treatment of Financial Sanctions which takes effect in January 2022.[742] Under the current legal regime, it is unclear whether fines imposed by foreign authorities are tax deductible. In this regard, the new law clarifies that foreign punitive financial sanctions will be tax-deductible only in exceptional cases, namely (i) if they violate Swiss public policy, or (ii) if a company credibly demonstrates that it has taken all reasonable steps to comply with the law. As in the past, domestic punitive financial sanctions will remain non tax-deductible. In addition, bribes paid to private individuals will no longer be tax-deductible. This will harmonize tax and criminal law, which banned bribery of private individuals in 2015.[743] Finally, entities will no longer be able to deduct expenses that make a criminal offense possible or are paid in return for one being committed.[744]

2. Enforcement Efforts

With respect to recent Swiss anti-corruption enforcement, one of the most interesting cases relates to the return of CHF 36.6 million ($41 million) to the South American Football Confederation (CONMEBOL), which was secured by the Attorney General of Switzerland (OAG) between December 2019 and September 2020.[745] Among the various football-related investigations, the OAG opened criminal proceedings against the former president of CONMEBOL, Nicolás Leoz of Paraguay, and the former secretary general of CONMEBOL, Eduardo Deluca of Argentina. Both were alleged to have received bribes in exchange for the allocation of television broadcasting rights and other marketing rights for soccer competitions organized by CONMEBOL, including the Copa América and the Copa Libertadores.[746]

In August 2019, Leoz died before the Paraguayan Supreme Court could rule on his appeal of an extradition order that would have sent him to the United States to face conspiracy charges related to soccer corruption;[747] accordingly, the criminal proceedings against him in both Switzerland and the United States were abandoned. Deluca, on the other hand, was charged by the Swiss OAG

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[742] Federal Tax Administration, Foreign Fines Tax-deductible in Exceptional Cases from 2022 (Nov. 11, 2020), https://www.estv.admin.ch/estv/en/home/die-estv/medien/nsb-news_list.msg-id-81090.html.
[743] CC 311.0 Swiss Criminal Code of 21 December 1937 (Status as of 1 July 2020), Articles 322-octies and 322-novies.
[744] CC 311.0 Swiss Criminal Code of 21 December 1937 (Status as of 1 July 2020), Articles 322-octies and 322-novies.
[745] Office of the Attorney General of Switzerland Press Release, Football: Restitution of over CHF 36 million (Oct. 14, 2020), https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-80692.html#:~:text=The%20funds%20forfeited%20between%20December,be%20returned%20directly%20to%20it.
[746] Agence France Presse, *Swiss Courts Return $40 Million To CONMEBOL In Corruption Probe*, BARRON'S (Oct. 14, 2020), https://www.barrons.com/articles/swiss-courts-return-40-million-to-conmebol-in-corruption-probe-01602676804.
[747] Daniela Desantis, *South American Football Leader Leoz Dies While Awaiting Extradition to U.S.*, REUTERS (Aug. 29, 2019), https://www.reuters.com/article/instant-article/idUKL2N25P0E9; Rebecca R. Ruiz, *Nicolás Leoz, FIFA Official Charged in Corruption Scandal, Dies at 90*, N.Y. TIMES (Sept. 1, 2019), https://www.nytimes.com/2019/09/01/obituaries/nicolas-leoz-dead.html.

with complicity in multiple instances of aggravated criminal mismanagement.[748] However, in September 2020, the OAG abandoned criminal proceedings against Deluca to avoid double jeopardy given the criminal proceedings conducted in Argentina[749] in relation to the same soccer corruption matter for which there was significant cooperation among prosecutors in several countries.[750]

Despite abandoning criminal proceedings against Leoz and Deluca, the Swiss OAG ordered various seizures of funds from Swiss bank accounts that belonged to the two men. CONMEBOL's recovery of $41 million in restitution from Swiss authorities in 2020 follows several prior restitution awards from former soccer officials convicted by the DOJ in its far-reaching and ongoing "FIFA-Gate" investigation.[751] According to CONMEBOL, the organization has now recovered more than $55 million in restitution from various sources, which is the largest sum of victim compensation received by any soccer organization or confederation involved in FIFA-Gate.[752]

F. China

1. Legislative Developments

In early 2020, the National People's Congress Standing Committee (NPCSC) authorized the National Supervision Commission (NSC) to promulgate implementation regulations for the new Supervision Law. The law establishes a nationwide supervisory and sanction system that covers all public officials who exercise public powers, including civil servants in administrative agencies, thus filling the gaps in the prior system for investigating illegal acts of public officials. Articles 11 and 45 of the law stipulate that, based on the results of supervision and investigation, the supervisory agency shall make decisions on administrative sanctions against public officials who violate the law in accordance with legal procedures. Following the passage of the law, the NPCSC also promulgated the *Law on the Administrative Disciplinary of Public Officials* (中华人民共和国公职人员政务处分法)[753] in June 2020, which further clarifies the methods, types, sanction period, and

[748] CC 311.0 Swiss Criminal Code of 21 December 1937 (Status as of 1 July 2020), Article 158 No 1 para. 3 in conjunction with Article 25.
[749] The Swiss OAG has provided the Argentinean authorities with mutual legal assistance in connection with this case.
[750] Deluca was also indicted by US prosecutors, but he was not successfully extradited to the United States to face charges. *See* Hugh Bronstein, *Argentine Judge Denies U.S. Extradition Request for Soccer Figures* (Oct. 18, 2016), https://www.reuters.com/article/us-soccer-fifa-argentina/argentine-judge-denies-u-s-extradition-request-for-soccer-figures-idUSKCN12I2MF.
[751] US Department of Justice Press Release: Former Brazilian Soccer Official Sentenced to Four Years' Imprisonment for Racketeering and Corruption Offenses (Aug. 22, 2018), https://www.justice.gov/usao-edny/pr/former-brazilian-soccer-official-sentenced-four-years-imprisonment-racketeering-and; US Department of Justice Press Release: Former FIFA Executive, President of CONMEBOL and Paraguayan Soccer Official Sentenced to Nine Years in Prison for Racketeering and Corruption Offenses (Aug. 29, 2018), https://www.justice.gov/usao-edny/pr/former-fifa-executive-president-conmebol-and-paraguayan-soccer-official-sentenced-nine.
[752] CONMEBOL Press Release, CONMEBOL recuperó USD 55 millones de la corrupción y ahora va por más (Nov. 1, 2020), https://www.conmebol.com/es/conmebol-recupero-usd-55-millones-de-la-corrupcion-y-ahora-va-por-mas.
[753] China National People's Congress: *The Full Text of the "Law of the People's Republic of China on Governmental Sanctions of Public Officials" is Released* (June 20, 2020), http://www.npc.gov.cn/npc/c30834/202006/2ce1931bad6d479192a0072ee67b9da9.shtml.

applicable rules of the administrative sanctions on violations and provides a clear legal basis for the supervisory agency to accurately carry out administrative sanctions.

The regulations also clarify the rules, procedure, and supervision of the work of the supervisory agency and make coordinated arrangements with the criminal procedure law. According to People's Daily, the General Office of the Central Committee of the Communist Party of China (CPC) promulgated the Working Rules of Disciplinary Inspection and Supervision Organs on Handling Reports and Accusations (纪检监察机关处理检举控告工作规则, Working Rules)[754] in January 2020.

Under the Working Rules, any organization or individual has the right to report to the discipline inspection and supervision agency the following: (1) any violations by Party organizations or Party members of political discipline, organizational discipline, integrity discipline, work discipline, or other party disciplinary rules; (2) any individuals who fail to perform their duties in accordance with the law, with political and ethical codes of conducts, or who are suspected of corruption, bribery, abuse of power, negligence of duty, behaviors seeking improper personal gain, or squandering of state assets. Disciplinary supervision commissions shall handle such reports and accusations.

In October 2020, the CPC adopted the 14th Five-Year Plan (2021-25) for National Economic and Social Development and the Long-Term Objectives Through the Year 2035 (the Plan). Apart from the economic and social development objectives in the Plan, the Plan also stresses the need to improve the nationwide supervision system, enhance political supervision, and strengthen the supervision and balance of public power. Pursuant to the Plan, the government shall exercise full power to advance an anti-corruption system where officials are unable to—and have no desire to engage in—corruption. The Plan aims to establish an upright political environment with zero tolerance for any failures to comply.[755]

Lastly, the Standing Committee of the National People's Congress adopted and promulgated Amendment XI to the Criminal Law in December 2020.[756] Amendment XI to Criminal Law further amended the scope of the money laundering provision, specifically due to the fact that the crime often occurs in connection with corruption. Amendment XI is formulated to provide a sufficient legal basis for enforcement agencies to effectively punish money laundering activities resulting from corruption. In the past, the criminal sanctions for corruption offences (inclusive of taking or soliciting bribes, embezzlement, and graft) involving state functionaries are generally more severe than those involving non-state functionaries. Under the Amendment XI, the differences in criminal sanctions against corruption offences (inclusive of taking or soliciting bribes, embezzlement, and graft) conducted by state functionaries and by non-state functionaries are largely eliminated. One

[754] People's Daily: *The promulgation by General Office of the CPC Central Committee of Working Rules of Disciplinary Inspection and Supervision Organs Handling Reports and Accusations* (Feb. 4, 2020), http://paper.people.com.cn/rmrb/html/2020-02/04/nw.D110000renmrb_20200204_3-01.htm.
[755] Central Commission for Discipline Inspection: *Proposals of the Central Committee of the Communist Party of China on Formulating the Fourteenth Five-Year Plan for National Economic and Social Development and the Long-term Goals for 2035* (Nov. 3, 2020), http://www.ccdi.gov.cn/toutiao/202011/t20201103_229270.html.
[756] China National People's Congress: *Amendment XI to the Criminal Law of the People's Republic of China* (December 26, 2020), http://www.npc.gov.cn/npc/c30834/202012/850abff47854495e9871997bf64803b6.shtml.

remaining major difference in criminal penalties under the Amendment XI between state and non-state functionaries committing corruptions is that state functionaries may face life imprisonment or death penalty in the event that the amount involved is "especially huge" which severely damages the national and public interest.

2. Enforcement

China's anti-corruption enforcement actions continued apace in 2020. Based on the reports of the Central Commission for Discipline Inspection (CCDI),[757] the NSC, and the Supreme People's Court, a total of 443,000 corruption cases were investigated during the first nine months of the year, with 390,000 individuals disciplined and penalized (of whom approximately 337,000 individuals were disciplined under the Party's disciplinary measures), including 18 senior government officials at or above the minister (provincial governor) level, 1,989 at or above the sub-provincial level, 14,000 at or above the county level, 54,000 at or above the village level, as well as about 63,000 lower-level Party members and officials.

Thus, enforcement efforts against senior government officials at the provincial, ministerial, and higher levels continued in 2020. The range of people targeted by the continuous anti-corruption campaign is extensive. Among those, the most notable cases involving bribery and corruption include Hu Huaibang (胡怀邦), former Party Secretary and Chairman of the China Development Bank;[758] Zhang Zhinan (张志南), former member of the Standing Committee of the Fujian Provincial Party Committee and former Deputy Governor of the Fujian Provincial Government;[759] Ma Ming (马明), former member and Vice Chairman of the Chinese People's Political Consultative Conference of the Inner Mongolia Autonomous Region;[760] and Xu Guang (徐光), former member of the Party Committee and Vice Governor of the Henan Provincial Government.[761]

[757] Central Commission of Discipline Inspection: *Inspection and Supervision Report of the National Discipline Inspection and Supervision Organs For January to September 2020* (Oct. 24, 2020), http://www.ccdi.gov.cn/toutiao/202010/t20201023_227736.html.
[758] Central Commission of Discipline Inspection: *Hu Huaibang, Former Party Secretary and Chairman of the China Development Bank, Expelled from the Party for Serious Violations of Discipline and Law* (Jan. 11, 2020), http://www.ccdi.gov.cn/scdc/zggb/djcf/202001/t20200111_207562.html.
[759] Central Commission for Discipline Inspection and State Supervision Commission, *Zhang Zhinan, former member of the Standing Committee of the Fujian Provincial Party Committee and former deputy governor of the provincial government, was expelled from the party and public office for serious violations of discipline and law* (Sept. 30, 2020), http://www.ccdi.gov.cn/scdc/zggb/djcf/202009/t20200930_226589.html.
[760] Central Commission for Discipline Inspection and State Supervision Commission, *Ma Ming, former member and vice chairman of the CPPCC of the Inner Mongolia Autonomous Region, was expelled from the party and public office for serious violations of discipline and law* (Nov. 16, 2020), http://www.ccdi.gov.cn/scdc/zggb/djcf/202011/t20201116_230142.html.
[761] Central Commission for Discipline Inspection and State Supervision Commission, *Xu Guang, former member of the party group and deputy governor of the Henan Provincial Government, was expelled from the party and public office for serious violation of discipline and law* (Feb. 21, 2020), http://www.ccdi.gov.cn/scdc/zggb/djcf/202002/t20200221_211937.html.

G. Brazil

1. Legislative and Policy Developments

Brazil's new criminal law, which took effect in January 2020, aims to continue the country's efforts to stem widespread crime and corruption. The law establishes protections for whistleblowers reporting public corruption and fraud, requires the government to establish an ombudsperson office to facilitate whistleblower reports, shields whistleblowers from civil or criminal liability in connection with their reports and offers financial incentives for whistleblowers who provide information that leads to the recovery of proceeds from crimes against the public. Although Brazil previously had employed leniency agreements to encourage whistleblower complaints (including throughout Operação Lava Jato or "Operation Car Wash"), the new law formalizes protections and includes financial incentives for whistleblowing relating to public corruption, fraud in government procurement and contracts, and other crimes or misconduct that are considered harm the public interest.

Also in January 2020, Brazil imposed a regulation requiring companies that contract with the Federal District on matters over R$5 million ($979,892) to adopt compliance policies and procedures. The new regulation brings Brazil's Federal District in line with several Brazilian states requiring companies to report when seeking government contracts. As of October 2020, companies also must comply with strengthened Brazilian Central Bank regulations relating to reporting requirements for suspicious transactions, money laundering, and terrorist financing.

2. Enforcement Efforts

Brazil's Operation Car Wash investigation came to a close in 2020 after more than six years in the global spotlight as a high-profile corruption scandal. President Jair Bolsonaro ended the anti-corruption probe in October 2020, stating boldly that "there is no more corruption in the government."[762] Brazilian federal police began Operation Car Wash in 2014 to investigate allegations that executives at Petrobras, the Brazilian state-owned oil company, accepted bribes from construction firms in exchange for awarding contracts at inflated rates. The probe evolved into an extensive investigation into a money laundering scheme in which black market money dealers used small businesses to launder dirty money. High-ranking politicians are among the accused, such as former President Luiz Inácio Lula da Silva, who served prison time resulting from Operation Car Wash charges. The investigation faced sharp criticism from opponents who argued that the investigation was used as a tool to suppress political rivals.

Although President Bolsonaro terminated Operation Car Wash, enforcement efforts stemming from the investigation have continued. In November 2020, the Brazilian Federal Prosecution Service announced that it is seeking up to $196 million from Trafigura, an oil and gas commodities trader, alleging that, as a result of back door deals, Petrobras missed out on approximately $37 million in

[762] Clara Hudson, *Brazilian President Ends Operation Car Wash*, THE LATIN LAWYER (Oct. 12, 2020), https://latinlawyer.com/article/1234124/brazilian-president-ends-operation-car-wash.

revenue on 31 Brazilian fuel oil purchase and sale transactions carried out between May 2012 and October 2013. Brazilian authorities are also seeking damages from a dozen individuals in addition to six foreign companies (located in in Brazil, Panama, the Netherlands, and Singapore) that allegedly competed and benefited from the scheme and are defendants in the suit.[763]

3. Other Legal Developments

Earlier in 2020, Sergio Moro, the Justice Minister and former Operation Car Wash judge, resigned after accusing President Bolsonaro of trying to interfere in federal criminal investigations and exercising improper control of federal policy. Specifically, Moro accused Bolsonaro of attempting to replace a Rio de Janeiro police chief in order to install a new chief who would allow Bolsonaro to participate in corruption investigations, and that the president previously sought to replace the Rio de Janeiro head of police at the same time two of Bolsonaro's sons are under investigation by the Rio de Janeiro state prosecutor's office. During his time as the judge overseeing Operation Car Wash, Moro stood out as an anti-corruption leader who sentenced da Silva and other high-profile politicians to prison. After his appointment by Bolsonaro to the position of Justice Minister, however, Moro publicly clashed with Bolsonaro and ultimately listed the president's abandonment of an anti-corruption agenda as one of the principal reasons he decided to step down from his post.[764] Brazil's public prosecutor has opened a criminal investigation into Moro's allegations.[765]

4. United States Enforcement Efforts in Brazil

As discussed above in further detail,[766] in October 2020, São Paulo-based conglomerate J&F, a global meat and protein producer, pleaded guilty to a charge of conspiracy to violate the FCPA for a scheme to bribe officials in Brazil, and agreed to pay a fine of $256 million. Simultaneously, a J&F majority owned subsidiary, JBS S.A., agreed to pay the SEC disgorgement and prejudgment interest totaling about $28.9 million in a related settlement. The parties also agreed to self-report for three years.[767]

According to the DOJ, J&F made payments to Brazilian officials between 2005 and 2017 to "ensure that Brazilian state-owned and state-controlled banks would enter into debt and equity financing transactions with J&F and J&F-owned entities"[768] and to obtain permission for a merger from the state-owned pension fund. The DOJ alleged that between 2005 and 2014, J&F paid or promised more than $148 million to high-ranking Brazilian officials.[769] In exchange, J&F received hundreds of

[763] The six foreign companies are Trafigura do Brasil Consultoria, Trafigura AG, Trafigura PTE, Trafigura Group PTE, Trafigura Beheer BV, and Farringford Foundation.
[764] Terrence McCoy, *Bolsonaro Ran Against Corruption. Now, He'll Have to Find Another Slogan*, WASH. POST (Nov. 21, 2014), https://www.washingtonpost.com/world/the_americas/brazil-bolsonaro-corruption-sergio-moro/2020/11/20/dfd4e9f0-282e-11eb-92b7-6ef17b3fe3b4_story.html.
[765] Katy Watson, *Sergio Moro: Brazil Prosecutor Requests Bolsonaro 'Meddling' Probe*, BBC NEWS (Apr. 25, 2020), https://www.bbc.com/news/world-latin-america-52423473.
[766] *See supra* at p. 44.
[767] US Department of Justice Press Release No. 20-1092: J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over $256 Million to Resolve Criminal Foreign Bribery Case (Oct. 14, 2020).
[768] US Department of Justice Press Release No. 20-1092: J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over $256 Million to Resolve Criminal Foreign Bribery Case (Oct. 14, 2020).
[769] Information, *DOJ v. J&F Investimientos SA*, No. 20-CR-365 (E.D.N.Y. Oct. 14, 2020).

millions of dollars in financing from a Brazilian state-owned bank. In another instance, J&F paid more than $4.6 million to a high-ranking executive of a Brazilian state-controlled pension fund, in exchange for approval of a significant merger that benefited J&F. The company also paid about $25 million to a high-ranking Brazil federal legislator to secure hundreds of millions of dollars of financing from a state-owned Brazil bank.

Meanwhile the SEC alleged that Joesley Batista and Wesley Batista, members of the family that controls J&F, engaged in a scheme in order to facilitate JBS's 2009 acquisition of Pilgrim's Pride Corporation (Pilgrim), an American company.[770] As alleged by the SEC, following that acquisition and while serving as Pilgrim board members, the Batistas made payments of $150 million between 2009 and 2015 to government officials at the direction of a former Brazil Finance Minister using funds from intercompany transfers, dividend payments, and other means.

As mentioned above, in December 2020 Vitol agreed to pay a combined $135 million to resolve the DOJ investigation into FCPA violations to resolve a parallel investigation in Brazil.[771] The company also reached an agreement with the Brazilian government, under which it admitted guilt and agreed to make improvements to its internal reporting and compliance functions. Over a period of 15 years, Vitol paid bribes of more than $8 million to at least four officials at Brazil's state-owned oil company Petrobras. Vitol paid the bribes in exchange for receiving confidential pricing and competitor information. Vitol also admitted that from 2011 to 2014, it bribed at least five additional Petrobras officials in exchange for receiving confidential pricing information that it used to win fuel oil contracts with Petrobras. DOJ credited $45 million of the total penalty against the amount that Vitol paid to Petrobras to resolve the investigation by the Brazilian Ministério Público Federal for conduct related to the company's bribery scheme in Brazil.

H. Mexico

1. Enforcement Efforts

In February 2020, Spanish law enforcement authorities arrested former Petróleos Mexicanos (PEMEX) CEO Emilio Lozoya Austin on a Mexican warrant associated with Pemex's allegedly inflated purchase of a retired fertilizer plant from Altos Hornos de México, a major steel manufacturer, for 9.5 billion Mexican Pesos ($475 million). Mexican authorities also have been looking more broadly at Lozoya's dealings with the company Odebrecht. In 2016, as part of a settlement agreement with authorities in the United States, Brazil, and Switzerland arising out of their schemes to pay hundreds of millions of dollars in bribes to government officials around the world, Odebrecht's management admitted to American, Brazilian, and Swiss investigators that the company had paid 209.35 million Mexican pesos ($10.5 million) in bribes to Mexican officials.[772]

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[770] US Securities and Exchange Commission Press Release No. 2020-254: SEC Charges Brazilian Meat Producers With FCPA Violations (Oct. 14, 2020).
[771] US Department of Justice Press Release No. 20-1310: Vitol Inc. Agrees to Pay over $135 Million to Resolve Foreign Bribery Case (Dec. 3, 2020).
[772] Kirk Semple and Azam Ahmed, *Mexico Charges Former Oil Official With Bribery in Anticorruption Drive*, N.Y. TIMES (May 28, 2019), https://www.nytimes.com/2019/05/28/world/americas/mexico-corruption-prosecution-oil-company.html.

Spain agreed to extradite Lozoya to Mexico, where he now faces charges for tax fraud and bribery.[773]

The year 2020 was the first full year of tenure for Mexico's first-ever Chief Anti-Corruption Prosecutor, María de la Luz Mijangos Borja,[774] who was appointed in spring 2019.[775] Thus far, the anti-corruption prosecutor's office has been underfunded but it is set to receive a small boost to its FY2021 budget.[776] In a report to the Mexican Senate in spring 2020, Borja outlined challenges that her office has faced during its first full year in existence; for example, the office is undertaking nearly 1,000 corruption cases, but has only 36 prosecutors, 11 staff for managerial and administrative support, and two experts on criminology.[777] The office has thus far been notably absent from certain noteworthy corruption investigations that President Andrés Manuel Lopez Obrador's administration has launched,[778] and Borja's office likely will need expanded staffing and resources in coming years as it seeks to address a growing list of high-profile investigations. For example, Borja's office recently undertook investigation of the former general secretary of President Lopez Obrador's own political party, the National Regeneration Movement (known by the acronym MORENA in Spanish). [779] The former party official is accused of making payments of 395 million pesos ($19.65 million) from party funds to companies owned by a politically connected business owner in exchange for "phantom" works and services that were never actually performed.[780]

2. Other Legal Developments

The United States, Mexico, and Canada Trade Agreement (USMCA) entered into force in July 2020, following ratification by the three signatory countries.[781] The passage of the USMCA is significant as the parties to the agreement now have a shared understanding on anti-corruption and

[773] *Ex-Pemex Boss Faces Hearing over Graft Charges on Return to Mexico*, REUTERS (July 16, 2020), https://www.reuters.com/article/us-mexico-corruption/ex-pemex-boss-faces-hearing-over-graft-charges-on-return-to-mexico-idUSKCN24H2QB.
[774] Directory of the Mexican Attorney General's Office, Titular de la Fiscalía Especializada en Combate a la Corrupción, https://www.gob.mx/fgr/estructuras/maria-de-la-luz-mijangos-borja.
[775] Luis Dantón Martínez Corres, *New Corruption Prosecutor Opens 680 Investigations*, THE FCPA BLOG (Dec. 18, 2019), https://fcpablog.com/2019/12/18/new-corruption-prosecutor-opens-680-investigations/.
[776] Maureen Meyer, *Mexico Faces a Test for its Anti-Corruption and Justice Reform Efforts*, WOLA (Nov. 25, 2020), https://www.wola.org/analysis/mexico-faces-test-anti-corruption-justice-reform-efforts/.
[777] Maureen Meyer, *Mexico Faces a Test for its Anti-Corruption and Justice Reform Efforts*, WOLA (Nov. 25, 2020), https://www.wola.org/analysis/mexico-faces-test-anti-corruption-justice-reform-efforts/.
[778] For example, the anti-corruption prosecution office has not been involved in the investigation of Emilio Lozoya; rather, the Public Prosecutor's Office has led the charge. *See* Martin Vivanco Lira, *Why the Lozoya Case Won't Be Mexico's Lava Jato*, AMERICAS QUARTERLY (Dec. 21, 2020), https://americasquarterly.org/article/why-the-lozoya-case-wont-be-mexicos-lava-jato/.
[779] Abel Barajas, *Llega transa de Morena a Fiscalía Anticorrupción*, LUCES DEL SIGLO (June 19, 2020), https://lucesdelsiglo.com/2020/06/19/llega-transa-de-morena-a-fiscalia-anticorrupcion-nacional/; Maureen Meyer, *Mexico Faces a Test for its Anti-Corruption and Justice Reform Efforts*, WOLA (Nov. 25, 2020), https://www.wola.org/analysis/mexico-faces-test-anti-corruption-justice-reform-efforts/.
[780] Abel Barajas, *Llega transa de Morena a Fiscalía Anticorrupción*, LUCES DEL SIGLO (June 19, 2020), https://lucesdelsiglo.com/2020/06/19/llega-transa-de-morena-a-fiscalia-anticorrupcion-nacional/; Maureen Meyer, *Mexico Faces a Test for its Anti-Corruption and Justice Reform Efforts*, WOLA (Nov. 25, 2020), https://www.wola.org/analysis/mexico-faces-test-anti-corruption-justice-reform-efforts/.
[781] Office of the United States Trade Representative, United States-Mexico-Canada Agreement, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

compliance, as set forth in Chapter 27 of the USMCA.[782] Of note is the commitment of the three countries' anti-corruption law enforcement agencies to cooperate and coordinate with one another in cross-border investigations related to the three countries' anti-corruption laws.[783]

Also in March 2020, the Mexican Corruption Prosecution Bureau, which forms part of the Mexican Federal Prosecution Office, submitted its first Annual Report to the Senate of Mexico.[784] According to that report, the Mexican Federal Prosecution Office will focus anti-corruption efforts on:

- ending corporate impunity by prosecution of companies and of their agents/representatives for corruption crimes;
- creating a department dedicated to corporate corruption;
- developing guidelines for the evaluation of corporate compliance programs; and
- submitting suggested reforms to Mexican lawmakers to strengthen prosecutorial rights and effectiveness.[785]

In another noteworthy development, the United States arrested Mexico's former Defense Minister, General Salvador Cienfuegos Zepeda, as he and his family arrived at the Los Angeles International Airport in October 2020 for a US vacation.[786] Federal prosecutors in New York indicted Cienfuegos on drug trafficking charges; however, the US DOJ reversed course less than one month later and agreed with Mexico that US prosecutors would drop charges and return Cienfuegos to Mexico for possible prosecution there.[787] His surprising release followed a significant US investigation that allegedly revealed Cienfuegos' ties to the country's drug cartels—which DOJ officials described as a window into institutional corruption in Mexico. Prosecutors alleged that intercepted messages showed that, during his tenure as Defense Minister, Cienfuegos accepted bribes in exchange for ensuring that the military did not take action against the cartel and that operations were initiated against its rivals.[788] The US DOJ provided Mexico with evidence and hoped the investigation would

[782] Agreement between the United States of America, the United Mexican States, and Canada (July 1, 2020), Chapter 27, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.
[783] Agreement between the United States of America, the United Mexican States, and Canada (July 1, 2020), Chapter 27.9, https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.
[784] Informe Anual de Actividades y Resultados, Fiscalía Especializada en Combate a la Corrupción (Mar. 2020), https://fcpablog.com/wp-content/uploads/2020/04/INFORME-ANUAL-DE-ACTIVIDADES-Y-RESULTADOS-VF-pdf-pdf.pdf.
[785] Fiscalía Especializada en Combate a la Corrupción, Informe Anual de Actividades y Resultados (Mar. 2020), https://fcpablog.com/wp-content/uploads/2020/04/INFORME-ANUAL-DE-ACTIVIDADES-Y-RESULTADOS-VF-pdf-pdf.pdf.
[786] Kevin Sieff, et al., *U.S. Arrest of Former Mexican Defense Chief Tests Anti-drug Alliance*, WASH. POST (Oct. 24, 2020), https://www.washingtonpost.com/world/the_americas/mexico-drugs-cartels-cienfuegos/2020/10/24/29fbd5ce-12f5-11eb-bc10-40b25382f1be_story.html.
[787] Kevin Sieff, et al., *U.S. Agrees to Drop Charges Against Former Mexican Defense Minister*, WASH. POST (Nov. 17, 2020), https://www.washingtonpost.com/world/the_americas/mexico-cienfuegos-drug-charges-dropped/2020/11/17/430bd056-291f-11eb-92b7-6ef17b3fe3b4_story.html.
[788] Larry Neumeister, et al., *US Drops Case Against Ex-Mexican General After Pressure*, AP NEWS (Nov. 18, 2020), https://apnews.com/article/new-york-us-news-william-barr-mexico-7fd6e9d770f34560ec613fe9970b7299.

continue[789] but in January 2021 Mexican officials exonerated Cienfuegos without a trial—dashing the hopes of US authorities for continued cooperation in the matter.[790]

I. Other Latin American Countries

Throughout 2020, as Latin American governments focused on the COVID-19 pandemic and its effects, observers throughout the Western Hemisphere raised concern over the heightened risk of increased levels of corruption in the pandemic response.[791] For example, the non-governmental organization Transparency International warned that access to state funds, and potential misuse of those funds, likely will increase as countries attempt to respond to the health emergency, requiring robust oversight of government actions in the effort to combat the pandemic.[792] And, as discussed in detail above, the OECD Working Group on Bribery issued a statement warning that "bribery and corruption have the potential to undermine the global response to tackle the [COVID-19] crisis,"[793] suggesting that the pandemic may result in an uptick in related crimes.

These warnings have proved accurate as corruption scandals have emerged from the recent procurement practices of the health ministries of several Latin American countries. In the most striking example, the Bolivian health minister was arrested amid allegations that his agency purchased 170 ventilators at the inflated price of nearly $28,000 each, when the manufacturer in Spain contends that it sold those same ventilators to a distributor for only $6,500.[794] Similarly, a top aide to the president of Panama resigned after prosecutors began investigating the Panamanian government's planned purchase of 100 ventilators at nearly $50,000 each.[795] In addition, government officials in Argentina, Brazil, and Colombia all were investigated for pandemic-related corruption in 2020, with alleged misconduct ranging from directly embezzling public health care funds intended to build field hospitals for COVID-19 patients to directing government agencies to purchase expired and dramatically overpriced N95 surgical masks from a politically connected vendor.[796]

Whereas the pandemic presents new challenges, some Latin American governments pursued enforcement actions in 2020 stemming from corruption scandals that began years ago. In

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[789] *Salvador Cienfuegos: US drops Charges Against Mexican Ex-minister*, BBC NEWS (Nov. 19, 2020), https://www.bbc.com/news/world-us-canada-54982305.
[790] Natalie Kitroeff, et al., *In Blow to U.S. Alliance, Mexico Clears General Accused of Drug Trafficking*, N.Y. TIMES (Jan. 15, 2021), https://www.nytimes.com/2021/01/15/world/americas/mexico-general-drug-charges.html.
[791] *Status of Latin America's Anti-corruption Fight amid Health and Political Challenges*, CONG. RESEARCH SERV. (Apr. 21, 2020), https://fas.org/sgp/crs/row/IN11350.pdf.
[792] *Corruption Could Cost Lives in Latin America's Response to the Coronavirus*, TRANSPARENCY INT'L (Mar. 31, 2020), https://www.transparency.org/en/news/corruption-could-cost-lives-in-latin-americas-response-to-the-coronavirus#.
[793] OECD Working Group on Bribery, *The Global Response to the Coronavirus Pandemic Must Not Be Undermined by Bribery* (Apr. 22, 2020), https://www.oecd.org/corruption/the-global-response-to-the-coronavirus-pandemic-must-not-be-undermined-by-bribery.htm.
[794] Joshua Goodman, *Spread of Coronavirus Fuels Corruption in Latin America*, AP NEWS (May 27, 2020), https://apnews.com/article/a240ff413fb23220aff30c6d6e6aba4c.
[795] Joshua Goodman, *Spread of Coronavirus Fuels Corruption in Latin America*, AP NEWS (May 27, 2020), https://apnews.com/article/a240ff413fb23220aff30c6d6e6aba4c.
[796] Joshua Goodman, *Spread of Coronavirus Fuels Corruption in Latin America*, AP NEWS (May 27, 2020), https://apnews.com/article/a240ff413fb23220aff30c6d6e6aba4c.

December 2020, regulators in Colombia fined the Brazilian conglomerate Odebrecht and affiliated construction companies approximately $84.5 million stemming from similar corruption allegations for which the company originally pleaded guilty in US federal court more than four years earlier.[797] In addition, prosecutors in Peru have recently brought Odebrecht-related corruption and money laundering charges against the former Peruvian President Ollanta Humala and the former first lady, and the matter is expected to go to trial in 2021.[798]

However, other Latin American efforts to combat corruption also have showed signs of stalling. In Central America in particular, backlash from political and economic elites facing investigations resulted in closures of two important international anti-corruption initiatives. In late 2019, Guatemalan President Jimmy Morales closed the UN-supported International Commission Against Impunity in Guatemala after investigators began examining alleged criminal acts of President Morales.[799] Similarly, in early 2020, Honduran President Juan Orlando Hernández elected not to renew the mandate of the Organization of American States-backed Mission to Support the Fight Against Corruption and Impunity in Honduras after his brother was convicted in the United States on drug trafficking charges.[800]

In December 2020, the US Congress passed legislation that may at least partially fill the void left by these two anti-corruption closures in Central America. Congress included legislation titled the "United States-Northern Triangle Enhanced Engagement Act"[801] in the omnibus appropriations and COVID-19 relief package that was signed into law in the final days of the year.[802] The legislation requires that by summer 2021, the incoming Biden administration shall publish of a list of corrupt and undemocratic individuals from Guatemala, Honduras, and El Salvador who will be denied entry to the United States.[803] Some commentators have begun to refer to this as the "Engel List," named after former Rep. Elliot Engel, the prior Chairperson of the House Committee on Foreign Affairs, who succeeded in passing the provision during his final days in office.

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[797] Reuters Staff, *Colombia Regulator Fines Odebrecht, Consortium Members $84.5 Million*, REUTERS (Dec. 28, 2020), https://www.reuters.com/article/odebrecht-colombia-idUKL1N2J81G9?edition-redirect=uk.
[798] Anthony Lin, *The Biggest Trials Coming to Courts Around the World in 2021,* BLOOMBERG (Dec. 16, 2020), https://www.bloomberg.com/news/articles/2020-12-17/the-biggest-trials-coming-to-courts-around-the-world-in-2021.
[799] Arturo Conde, *U.S. Will Lose Out as Guatemala Shuts Anti-Corruption Commission, Experts Say*, NBC NEWS (Aug. 30, 2019), https://www.nbcnews.com/news/latino/u-s-will-lose-out-guatemala-shuts-anti-corruption-commission-n1047786.
[800] Gustavo Palencia, REUTERS (Jan. 17, 2020), https://www.reuters.com/article/us-honduras-corruption/honduras-ends-mandate-for-anti-corruption-body-idUSKBN1ZH014.
[801] The United States–Northern Triangle Enhanced Engagement Act, H.R. 2615, 116th Congress (Received in the Senate, July 16, 2019).
[802] Lisa Colvin, *Trump Signs Massive Measure Funding Government, COVID Relief*, ASSOCIATED PRESS (Dec.. 27, 2020), https://apnews.com/article/donald-trump-politics-coronavirus-pandemic-2a2645e52fda774ae8f1443b4dffc82e.
[803] US House of Representatives, Committee on Foreign Affairs, Press Release: Engel U.S.-Northern Triangle Enhanced Engagement Act Passes Congress (Dec. 22, 2020), https://foreignaffairs.house.gov/press-releases?ID=87FA0088-D13D-45A8-912A-A59BBEEDFF07.

J. Russian Federation

The Russian Central Bank alerted the government to concerns that cryptocurrencies could be used to launder money and finance terrorism and, in response, Russia will implement a new law regulating cryptocurrencies in January 2021.[804] The new law legalizes the trade of cryptocurrency but at the same time prohibits it from being used directly in exchange for goods and services within Russia—rather, any digital currency must be sold for Russian rubles first. Under the new law, the Russian Central Bank will oversee cryptocurrency exchanges established by domestic banks. In the past, Russia has strongly opposed cryptocurrency usage, so this new law represents a shift in policy towards embracing the use of digital assets as currency.[805]

GRECO, of which Russia is a member, published a report in August 2020 detailing the progress that the country has made on implementing measures to combat corruption and identifying unresolved concerns.[806] The compliance report focused on the corruption of members of Parliament, judges, and prosecutors in Russia. With regard to Parliament, the report concluded that transparency of the legislative process needs strengthening and that the legislature's code of ethics leaves out important corruption risk-related issues including contacts with third parties and post-employment restrictions. Regarding judges, the report concluded that the rules on judicial immunity should be revisited so that judges' immunity is strictly limited to functional immunity instead of the broader protections currently in place. As for prosecutors, the report flagged that only generic criteria have been established to protect case assignments from undue influence, and that more specific standards would be beneficial to the anti-corruption effort. Overall, the report concluded that the Russian government has improved its anti-corruption policies and practices; however, more steps need to be taken to complete the recommendations laid out by GRECO.[807]

Finally, the effect of the COVID-19 pandemic on the enforcement of bribery offenses in Russia is unclear. According to the statistics published by the Judicial Department of the Supreme Court of the Russian Federation, in 2019, collectively nationwide there were 1,604 active investigations into officials suspected of receiving bribes, 1,339 of which resulted in a conviction. The first six months of 2020 resulted in 776 active investigations and 448 convictions. At this rate, 2020 appeared to be on target in terms of active investigations as compared to 2019 but it is unclear if the conviction rate would remain as high as it was in 2019.[808]

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[804] Kenneth Rapoza, *Putin Outlines New Russian Crypto Rules And Banks Prepare For New Exchanges*, FORBES (Aug. 6, 2020), https://www.forbes.com/sites/kenrapoza/2020/08/06/putin-outlines-new-russian-crypto-rules-and-banks-prepare-for-new-exchanges/?sh=5b3854b66ed7.
[805] Roger Huang, *Russia Backs Away From Total Cryptocurrency Ban*, FORBES (Aug. 10, 2020), https://www.forbes.com/sites/rogerhuang/2020/08/10/russia-backs-away-from-total-cryptocurrency-ban/?sh=7d240d467520.
[806] Groups of States Against Corruption, Fourth Evaluation Round, Compliance Report: Russian Federation (Aug. 18, 2020), https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809f3c18.
[807] Groups of States Against Corruption, Fourth Evaluation Round, Compliance Report: Russian Federation (Aug. 18, 2020), https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16809f3c18.
[808] Judicial Statistics Data, Summary of Statistical Information, JUDICIAL DEPARTMENT AT THE SUPREME COURT OF THE RUSSIAN FEDERATION, http://www.cdep.ru/index.php?id=79.

K. Canada

Canada amended its Criminal Code in 2018 to include new processes for "remediation agreements" that will function as DPAs.[809] The Canadian model follows the United Kingdom in that the courts perform a gatekeeping function, determining whether the terms of agreements are reasonable, proportionate, and serve the interests of justice before they can be executed.[810] However, despite the promise of a robust new regime following the 2018 legislation, Canadian authorities have yet to execute any remediation agreements.[811] The government's objectives have been sidetracked, in part, by the political pushback Prime Minister Justin Trudeau received, including from his own party and Cabinet,[812] following allegations that he and his administration improperly pressured the Minister of Justice and the Attorney General of Canada, Jody Wilson-Raybould, into negotiating a remediation agreement with SNC-Lavalin, which she ultimately declined to do.[813] As a result of this controversy, the use of remediation agreements has come under scrutiny, with some critics claiming that they let companies off the hook too easily.[814]

Continuing its focus on individual prosecutions, in November 2020, the Royal Canadian Mounted Police (RCMP) announced charges against Damodar Arapakota, a former executive at Toronto-based technology company IMEX Systems, alleging that he bribed a public official in Botswana in violation of Section 3(1) of the Corruption of Foreign Public Officials Act (CFPOA).[815] Specifically, the RCMP alleged that the former executive "provided financial benefit for a Botswanan public official and his family"[816] in order to secure business deals. The RCMP opened the investigation into Arapakota in 2018 after IMEX Systems self-reported the matter.

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[809] *See* WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 79-80 (Jan. 30, 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020; *see also* WilmerHale, *Global Anti-Bribery Year-in-Review: 2018 Developments and Predictions for 2019*, at 76-77 (Jan. 17. 2019), https://www.wilmerhale.com/en/insights/client-alerts/20190117-global-anti-bribery-year-in-review-2018-developments-and-predictions-for-2019.

[810] Budget Implementation Act, 2018 No. 1 (S.C. 2018, c. 12) (Can.).

[811] WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 79 (Jan. 30. 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.

[812] For example, following the statement of Wilson-Raybould on the SNC-Lavalin incident, one of Trudeau's key cabinet ministers, Jane Philpott, resigned, saying she had "lost confidence in how the government has dealt with this matter and in how it has responded to the issues raised." Jen Gerson, *Canadian Politics Aren't Cute. They're Corrupt.*, N.Y. TIMES (Mar. 6, 2019), https://www.nytimes.com/2019/03/06/opinion/canada-scandal-justin-trudeau.html.

[813] Amini Khoungui, *Canada's New DPA Regime Brings Internal Controls to the Forefront*, THE FCPA BLOG (Aug. 22, 2019), https://fcpablog.com/2019/08/22/canadas-new-dpa-regime-brings-internal-controls-to-the-foref/. We discussed the SNC-Lavalin matter in some detail in our 2019 Year-in-Review publication. WilmerHale, *Global Anti-Bribery Year-in-Review: 2019 Developments and Predictions for 2020*, at 79 (Jan. 30. 2020), https://www.wilmerhale.com/en/insights/client-alerts/20200130-global-anti-bribery-year-in-review-2019-developments-and-predictions-for-2020.

[814] Maham Abedi, *SNC-Lavalin affair, explained: A look at remediation deals at the centre of the controversy*, GLOBAL NEWS (Mar. 6, 2019), https://globalnews.ca/news/5022558/deferred-prosecution-agreements-snc-lavalin/.

[815] Royal Canadian Mounted Police News Release: RCMP Lays Charges under the Corruption of Foreign Public Officials Act (Nov. 12, 2020), https://www.rcmp-grc.gc.ca/en/news/2020/rcmp-lays-charges-the-corruption-foreign-public-officials-act.

[816] Royal Canadian Mounted Police News Release: RCMP Lays Charges under the Corruption of Foreign Public Officials Act (Nov. 12, 2020), https://www.rcmp-grc.gc.ca/en/news/2020/rcmp-lays-charges-the-corruption-foreign-public-officials-act.

In July 2020, the Ontario Securities Commission (OSC) approved a settlement agreement in a whistleblower case involving digital currency marketplace Coinsquare.[817] The case was the OSC's first-ever enforcement action for retaliation against whistleblowers—nearly two decades after the Canadian Parliament amended its criminal code to allow for the prosecution of private-sector retaliation against whistleblowers. The criminal code was amended, in part, to protect whistleblowers and encourage them to expose corruption.[818] Coinsquare entered into a settlement with the OSC[819] to resolve allegations of market manipulation, misleading statements, and retaliation against a whistleblower—agreeing to implement significant corporate governance enhancements, which includes the establishment of an independent board of directors.[820]

L. Other International Developments

1. India

India's new independent Lokpal,[821] or anti-corruption ombudsperson, is reported to have received 1,427 complaints after implementing a new format for lodging complaints in March 2020, but has disposed of 1,345 of those complaints.[822] One case of note is the investigation of Ajay Kumar Gupta, the State of Himachal Pradesh's senior health official, who was arrested in May 2020 in an alleged corruption case. According to audio recordings, Gupta purportedly asked a COVID-19 protective equipment supplier for a bribe in exchange for clearing a supply order for the Himachal Pradesh Government.[823] Despite actively investigating incidents of domestic bribery, India did not open a single foreign bribery investigation between the years 2016 and 2019, according to an October 2020 report by Transparency International.[824]

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[817] Ontario Securities Commission News Release: OSC Panel Approves Settlement with Coinsquare, Cole Diamond, Virgile Rostand and Felix Mazer (July 21, 2020), https://www.osc.gov.on.ca/en/NewsEvents_nr_20200721_osc-panel-approves-settlement-with-coinsquare-diamond-rostand-mazer.htm?RSS=NREN&RSS=NREN.
[818] Conor Ferrall, *Improving Canada's Anti-Corruption Practices*, THE REGULATORY REVIEW (Sept. 23, 2020), https://www.theregreview.org/2020/09/23/ferrall-improving-canada-anti-corruption-practices/.
[819] Canada amended its criminal code in 2004 to allow for the prosecution of private-sector retaliation against whistleblowers, but there has not yet been a prosecution of retaliation against whistleblowers since the amendment and the opening of the Office of the Whistleblower in 2016. *See* Michael Griffiths, *Canada's Whistleblower Protections Improved by Threat of Prosecution for Retaliators*, GLOBAL INVESTIGATIONS REVIEW (Nov. 16, 2020), https://globalinvestigationsreview.com/news-and-features/investigators-guides/canada/article/canadas-whistleblower-protections-improved-threat-of-prosecution-retaliators.
[820] Ontario Securities Commission News Release: OSC Panel Approves Settlement with Coinsquare, Cole Diamond, Virgile Rostand and Felix Mazer (July 21, 2020), https://www.osc.gov.on.ca/en/NewsEvents_nr_20200721_osc-panel-approves-settlement-with-coinsquare-diamond-rostand-mazer.htm?RSS=NREN&RSS=NREN.
[821] The 'Lokpal' is an independent ombudsman established in 2019 to investigate and prosecute cases of corruption by public officials, aimed at strengthening laws relating to prosecution of bribe givers and facilitators and an expansion of existing laws governing money laundering.
[822] *Anti-corruption Ombudsman Lokpal Gets 1.427 Complaints in One Year,* THE HINDU (July 1, 2020), https://www.thehindu.com/news/national/anti-corruption-ombudsman-lokpal-gets-1427-complaints-in-one-year/article31963258.ece.
[823] *Behind PPE Supply: Irregularities, Anomalies and Alleged Scams: A Himachal Pradesh Official was Arrested for Allegedly Demanding Bribe Against Purchase of PPEs*, THE FEDERAL (June 8, 2020), https://thefederal.com/news/behind-ppe-supply-irregularities-anomalies-and-alleged-scams/.
[824] Transparency International, Exporting Corruption; Progress Report 2020: Assessing enforcement of the OECD Anti-Bribery Convention (Oct. 2020), https://images.transparencycdn.org/images/2020_Report_ExportingCorruptionFull_English.pdf.

2. Ukraine

Amendments to Ukraine's anti-corruption law that significantly enhance protections and incentives for whistleblowers[825] took effect in January 2020.[826] The amended law offers financial rewards for cases where the loss to the state is over $420,000. Whistleblowers may receive up to 10% of the amount in controversy if a court finds the defendant guilty.[827] The amendments also require all government bodies, state-owned enterprises, and private companies that participate in public procurement for contracts worth approximately $825,000 or more to draft procedures for employees to raise concerns, implement internal reporting channels and provide guidance to employees on reporting concerns.[828] The amendments also extend the definition of "whistleblower" to apply to several areas of European law, bringing Ukraine's legislation on whistleblowers closer to the standards outlined by the EU Directive on the protection of whistleblowers,[829] and impose sanctions on companies that disclose a whistleblower's identity or terminate a whistleblower's employment.[830]

In May 2020, Ukraine adopted a banking law shielding banks from previous owners, a move aimed at further reducing corruption in the financial sector.[831] During the country's last economic crisis, many large private banks were nationalized or liquidated in an effort to "clean up" the financial sector.[832] Now, under the new banking law, former owners can no longer use the courts to seek ownership of or compensation for the over 100 banks that have been nationalized or closed since 2014—protecting public funds and taxpayers from illegal lending practices. The Ukrainian Parliament pushed this vital anti-corruption banking law forward in a move that allows the country to receive a $5.5 billion loan from the IMF. The headline case prompting the new banking law is PrivatBank, which is accused of fraudulently taking billions of US dollars from the bank in related

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[825] Will Neal, *Ukraine Introduces New Whistleblower Protections*, GLOBAL INVESTIGATIONS REVIEW (Nov. 15, 2019), https://globalinvestigationsreview.com/article/1210967/ukraine-introduces-new-whistleblower-protections.
[826] Will Neal, *Ukraine Introduces New Whistleblower Protections*, GLOBAL INVESTIGATIONS REVIEW (Nov. 15, 2019), https://globalinvestigationsreview.com/article/1210967/ukraine-introduces-new-whistleblower-protections.
[827] Laura Mallene, *Ukraine's New "Whistleblower Law" Enters Into Force*, ORGANIZED CRIME AND REPORTING PROJECT (Jan. 2, 2020), https://www.occrp.org/en/daily/11376-ukraine-s-new-whistleblower-law-enters-into-force.
[828] Maryna Kavaleuskaya, *Ukraine Adds Whistleblower Awards (and Protections) with New Amendments*, THE FCPA BLOG (Dec. 10, 2019), https://fcpablog.com/2019/12/10/ukraine-adds-whistleblower-awards-and-protections-with-new-amendments/.
[829] Oleksandr Kalitenko, *Protection of Whistleblowers: Legal Analysis of the Draft Law*, TRANSPARENCY INT'L UKRAINE (Oct. 9, 2019), https://ti-ukraine.org/en/news/protection-of-whistleblowers-legal-analysis-of-the-draft-law/.
[830] Maryna Kavaleuskaya, *Ukraine Adds Whistleblower Awards (and Protections) with New Amendments*, THE FCPA BLOG (Dec. 10, 2019), https://fcpablog.com/2019/12/10/ukraine-adds-whistleblower-awards-and-protections-with-new-amendments/.
[831] Anders Åslund, *Ukraine Approves Crucial Anti-oligarch Banking Law*, ATLANTIC COUNCIL (May 13, 2020), https://www.atlanticcouncil.org/blogs/ukrainealert/ukraine-approves-crucial-anti-oligarch-banking-law/.
[832] Vitaliy Protsenko and Anastasiia Ivantsova, *From Oschadbank To PrivatBank: How Ukraine Got Its State-Owned Banks And Why Wants To Sell Them*, VOX UKRAINE (Aug. 23, 2019), HTTPS://VOXUKRAINE.ORG/EN/FROM-OSCHADBANK-TO-PRIVATBANK-HOW-UKRAINE-GOT-ITS-STATE-OWNED-BANKS-AND-WHY-WANTS-TO-SELL-THEM/.

lending to its shareholders. PrivatBank's former owner, Ihor Kolomoisky, had attempted to use the courts to regain ownership of the bank by annulling the state's takeover.[833]

Ukraine's High Anti-Corruption Court (HACC)[834] secured two modest but significant convictions in August 2020.[835] The HACC sentenced Oleksandr Levkivsky, former head of the Rzhyshchiv Military Forestry, to four years in prison with a ban on holding public office for three years and his assistant, Yuriy Marysyk, was sentenced to three years in prison with a ban on holding office for two years. Levkivskyi was accused of accepting an offer of an illegal benefit and abuse of office, while Marysyk was accused of aiding and abetting corruption offenses. According to the investigation, Levkivsky was to receive $10,000 in exchange for issuing a lease on public forest land.[836]

Lastly, there was a major shift in Ukraine's prosecution staffing in 2020. Ruslan Ryaboshapka, the former Prosecutor General of Ukraine, who made corruption a priority of his office was replaced in March 2020 by Iryna Venediktova, a former advisor to President Zelensky. The Ukrainian Parliament (*Verkhovna Rada*) dismissed Ryaboshapka through a vote of no confidence. President Zelensky claimed that Ryaboshapka had not produced adequate results as prosecutor general. The dismissal is widely perceived as an interference into the anti-corruption reforms Ryaboshapka had begun to implement as his office had made corruption investigations a priority. The United States and other European countries objected to the dismissal.[837] Since Venediktova took over, more than half of the prosecutors in the Kiev have been dismissed.[838]

3. Malaysia

Malaysia instituted major legislative reforms on corruption and bribery through the Malaysian Anti-Corruption Commission Act 2018 (MACC).[839] One of the major reforms took effect in June 2020, and the law imposes a new theory of liability through which senior personnel, such as managers and directors of companies, may now be held personally liable for the corrupt criminal conduct committed by the companies for which they work.[840] To avoid liability, the individual must show that the actions in question were committed without his or her consent and that he or she had taken the

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[833] *Ukraine Central Bank Accuses PrivatBank Ex-owner of Orchestrating Protests*, REUTERS (Nov. 27, 2019), https://www.reuters.com/article/us-ukraine-privatbank-kolomoisky/ukraine-central-bank-accuses-privatbank-ex-owner-of-orchestrating-protests-idUSKBN1Y11OK.
[834] The HACC was created in 2018 to prosecute corruption cases, including high-level cases against political figures after the IMF required the country to establish an anti-corruption mechanism as part of the agreement that it would issue billions of dollars in credit to stabilize the Ukrainian economy. Ivanna Y. Kuz and Matthew C. Stephenson, *Ukraine's High Anti-Corruption Court Innovation for Impartial Justice*, U4 ANTI-CORRUPTION RESOURCE CENTER, https://www.u4.no/publications/ukraines-high-anti-corruption-court.
[835] *Ukraine's Anti-Corruption Court Bares its Teeth,* THE ECONOMIST (Sept. 26, 2020), https://www.economist.com/europe/2020/09/26/ukraines-anti-corruption-court-bares-its-teeth.
[836] *Bribe For Land Near Dnieper: HACC Convicts 2 Men*, TRANSPARENCY INT'L UKRAINE (Aug. 28, 2020), https://ti-ukraine.org/en/news/bribe-for-land-near-dnieper-hacc-convicts-2-men/.
[837] Patrick Reevell, *Ukraine Fires Prosecutor General, Alarming US, European Countries*, ABC NEWS (Mar. 6, 2020), https://abcnews.go.com/International/ukraine-fires-prosecutor-general-alarming-us-european-countries/story?id=69436552.
[838] Robyn Dixon & David Stern, *How Ukraine's Zelensky Lost the Anti-corruption Movement,* WASH. POST (Mar. 17, 2020), https://www.washingtonpost.com/world/europe/ukraine-corruption-zelensky-ryaboshapka-venediktova-trump-biden/2020/03/17/7dcab542-6636-11ea-912d-d98032ec8e25_story.html.
[839] Malaysian Anti-Corruption Commission (Amendment) Act 2018, Act A1567.
[840] Esther Lee, *Firms Urged to Be Prepared for New Corruption Law*, THE EDGE MARKETS (Mar. 18, 2020), https://www.theedgemarkets.com/article/firms-urged-be-prepared-new-corruption-law.

steps necessary to ensure that this act would not occur.[841] This section of the law significantly expands the scope of actors liable under MACC.[842]

In July 2020, a Malaysian court found former Prime Minister of Malaysia Najib Razak guilty of corruption charges and sentenced him to 12 years in prison.[843] This corruption scheme involved funds raised for Malaysian public development projects that were diverted to the former prime minister. As discussed above, Goldman Sachs paid more than $3 billion to the Malaysian government to settle charges related to the 1MBD scandal.[844]

The Malaysian anti-corruption agency is investigating the corruption claims against AirAsia. The inquiry was triggered by the allegations against Airbus made by the UK SFO.[845] As discussed above, the UK SFO has alleged that Airbus paid $50 million to a sports team owned by two AirAsia executives following their purchase of over one hundred Airbus planes.[846] The AirAsia CEO, Tony Fernandes, has resigned.[847]

M. International Organizations

1. World Bank

In the fiscal year 2020, the World Bank Vice Group's Integrity Vice Presidency (INT) continued to vigorously investigate allegations of fraud and corruption arising in the context of World Bank Group projects. INT reviewed 2,958 complaints, opened 46 external investigations, managed 109 active external investigations, and completed 43 external investigations during the year, leading to the submission of 29 final investigation reports to the World Bank Group President, and 26 cases and 22 settlements to the Office of Suspension and Debarment (OSD).[848] Of the 109 active external investigations managed by INT, 58 involved allegations of corruption, collusion, or both.[849]

INT's investigative efforts apparently have not been deterred by the COVID-19 pandemic. INT notes that it has adapted to the circumstances and risks created by the pandemic through

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[841] Justin Ong, *MACC: Minding the Gap*, DELOITTE, https://www2.deloitte.com/my/en/pages/risk/articles/macc-minding-the-gap.html.
[842] Esther Lee, *Firms Urged to Be Prepared for New Corruption Law*, THE EDGE MARKETS (Mar. 18, 2020), https://www.theedgemarkets.com/article/firms-urged-be-prepared-new-corruption-law.
[843] *Goldman Sachs to Pay $3bn over 1MDB Corruption Scandal,* BBC NEWS (Oct. 22, 2020), https://www.bbc.com/news/business-54597256.
[844] *Goldman Sachs to Pay $3bn over 1MDB Corruption Scandal,* BBC NEWS (Oct. 22, 2020), https://www.bbc.com/news/business-54597256.
[845] *Malaysia's AirAsia Says Review Found Airbus Procurement Process Robust*, REUTERS (Mar. 20, 2020), https://in.reuters.com/article/airasia-group-probe-airbus-idINKBN217105.
[846] Charlotte Ryan, Yantoultra Ngui, and Asantha Sirimanne, *Airline Boss Who Schmoozed Airbus Exits With Orders in Focus*, BLOOMBERG (Feb. 3, 2020), https://www.bloomberg.com/news/articles/2020-02-03/airbus-probe-prompts-arrest-demand-for-ex-srilankan-airlines-ceo.
[847] Charlotte Ryan, Yantoultra Ngui, and Asantha Sirimanne, *Airline Boss Who Schmoozed Airbus Exits With Orders in Focus*, BLOOMBERG (Feb. 3, 2020), https://www.bloomberg.com/news/articles/2020-02-03/airbus-probe-prompts-arrest-demand-for-ex-srilankan-airlines-ceo.
[848] World Bank Group, Sanctions System Annual Report for Fiscal Year 2020, at 6 and 21 (2020), http://documents1.worldbank.org/curated/en/861191602141633639/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY20.pdf.
[849] World Bank Group, Sanctions System Annual Report for Fiscal Year 2020, at 21 (2020), http://documents1.worldbank.org/curated/en/861191602141633639/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY20.pdf.

technology and deploying new systems.[850] For instance, INT introduced an internal system that records information for World Bank Group COVID-19 projects, and allows INT to review complaints relating to those projects more efficiently.[851]

INT also has enhanced its investigative process by formalizing evaluations of the compliance programs of the companies it investigates.[852] While INT already took compliance into account when considering the sanctions to be imposed on those companies, the Compliance Unit, which typically assesses the progress of companies in improving their compliance programs following the imposition of sanctions by the Bank, now intervenes at an earlier stage of the enforcement process to evaluate the current state of an organization's compliance procedures.[853] These evaluations, which mirror those conducted by the DOJ during its criminal investigations, will assess how well the companies' compliance programs work in practice, not just on paper.[854]

In 2020 INT changed its leadership by appointing Mouhamadou Diagne, former Inspector General of the Global Fund to Fight Aids, Tuberculosis, and Malaria, as Vice President of Integrity,[855] and Alan Bacarese, current Director for Integrity and Anti-Corruption at the African Development Bank, as the Investigations Director.[856]

2. OECD

In September 2020, the OECD Working Group on Bribery published a study on Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change.[857] The study analyzed companies' motivations for developing and adopting anti-corruption compliance measures, and made recommendations to companies and the international community accordingly. These recommendations encourage companies to, among other things, involve compliance in executive

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[850] World Bank Group, Sanctions System Annual Report for Fiscal Year 2020, at 7 (2020), http://documents1.worldbank.org/curated/en/861191602141633639/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY20.pdf.
[851] World Bank Group, Sanctions System Annual Report for Fiscal Year 2020, at 7 (2020), http://documents1.worldbank.org/curated/en/861191602141633639/pdf/World-Bank-Group-Sanctions-System-Annual-Report-FY20.pdf.
[852] Adam Dobrik, *World Bank Implements "Major" Compliance Initiative*, GLOBAL INVESTIGATION REVIEW (Oct. 2, 2020), https://www.lexology.com/pro/content/world-bank-implements-major-compliance-initiative. The initiative was announced in September 2020, during the World Bank's Fifth International Debarment Colloquium, accessible here: https://worldbank.scene7.com/s7viewers/html5/VideoViewer.html?asset=worldbankprod/OSD%20Virtual%20Colloquium%20-%20Roundtable%202-AVS&config=worldbankprod/WBG-Standard-Player&serverUrl=https://worldbank.scene7.com/is/image/&contenturl=https://worldbank.scene7.com/is/content/&posterimage=worldbankprod/OSD%20Virtual%20Colloquium%20-%20Roundtable%202-AVS&videoserverurl=https://worldbank.scene7.com/is/content.
[853] Adam Dobrik, *World Bank Implements "Major" Compliance Initiative*, GLOBAL INVESTIGATION REVIEW (Oct. 2, 2020), https://www.lexology.com/pro/content/world-bank-implements-major-compliance-initiative.
[854] Joshua Ray, *World Bank Follows DOJ by Evaluating Corporate Compliance Programs*, THE FCPA BLOG (Oct. 21, 2020), https://fcpablog.com/2020/10/21/world-bank-follows-doj-by-evaluating-corporate-compliance-programs/.
[855] Adam Dobrik, *World Bank Hires Auditor to Lead Anti-corruption Unit*, GLOBAL INVESTIGATION REVIEW (May 4, 2020), https://globalinvestigationsreview.com/just-anti-corruption/world-bank-hires-auditor-lead-anti-corruption-unit.
[856] Adam Dobrik, *World Bank Appoints New Investigations Director*, GLOBAL INVESTIGATION REVIEW (Nov. 24, 2020), https://globalinvestigationsreview.com/just-anti-corruption/multilateral-development-banks/world-bank-appoints-new-investigations-director.
[857] OECD, Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change (2020), https://www.oecd.org/corruption/corporate-anti-corruption-compliance.htm.

decisions; promote a compliance culture at all corporate levels through events, communications, and standards; ensure staff internalize the compliance culture, beyond the mechanical adoption of anti-corruption procedures; build local compliance teams to enforce compliance measures "on the ground"; and work together, for instance as business associations and along supply chains, to share anti-corruption knowledge or create anti-corruption standards.[858]

Finally, in November 2020, the OECD Working Group issued its much-anticipated Phase 4 Report of the United States' adherence to the OECD Treaty regarding transnational corruption, which is implemented by the FCPA (the Report).[859] The Report focuses on the US government's enforcement of the FCPA, and was issued following a year-long review that included a series of interviews with government, private sector, academic, and civil society experts. The Working Group commended the United States on "its sustained and outstanding commitment to enforcing its foreign bribery offense," acknowledging its "leading role in combating foreign bribery."[860] The Report highlights various positive achievements and good practices by the United States, which resulted in a significant increase in enforcement against foreign bribery and related offenses, including in multi-jurisdictional cases and cases of passive bribery.[861] The Report also stresses the positive impact of "increased guidance and transparency of enforcement policies," such as through the publication of deferred and non-prosecution agreements or the second edition of the DOJ Resource Guide to the FCPA, on encouraging voluntary disclosures and cooperation with investigations.[862]

The Report also highlights the US government's increasing FCPA enforcement since the OECD Working Group's Phase 3 Report in 2010. As detailed in the Report, between September 2010 and July 2019, through SEC and DOJ efforts, the United States convicted or sanctioned 174 companies and 115 individuals for foreign bribery and related offenses under the FCPA. This achievement resulted from a combination of enhanced expertise and resources to investigate and prosecute foreign bribery, the enforcement of a broad range of offenses in foreign bribery cases, the effective use of non-trial resolution mechanisms, and the development of published policies to incentivize companies' cooperation with law enforcement agencies.

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[858] OECD, Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change, at 76-77 (2020), https://www.oecd.org/corruption/corporate-anti-corruption-compliance.htm.
[859] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report, United States (Nov. 17, 2020), https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf.
[860] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report, United States, at 111 (Nov. 17, 2020), https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf.
[861] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report, United States, at 111-12 (Nov. 17, 2020), https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf. According to the OECD Report, 30% of DOJ foreign bribery cases resulted from voluntary self-disclosure, 20% from whistleblower reports, another 20% from referrals from foreign and civil authorities, and 15% each from media reports and the agency's own law enforcement activities (information provided by cooperating defendants and other sources, such as the review of suspicious activity reporting by financial institutions).
[862] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report, United States, at 112 (Nov. 17, 2020), https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf.

While the Report generally complimented the efforts by the DOJ, SEC, Department of Commerce, Department of State, and other US government agencies, the Working Group also identified areas for further improvement, including for the United States to:

- evaluate the effectiveness of the Corporate Enforcement Policy in terms of encouraging self-disclosure and of its deterrent effect on foreign bribery;
- continue to address recidivism through appropriate sanctions and raise awareness of its impact on the choice of resolution in FCPA matters;
- provide further guidance and enhance protections for whistleblowers who report potential FCPA anti-bribery violations;
- enhance the US anti-money laundering reporting framework by applying obligations to lawyers, accountants, and trust and company service providers;
- consider having the SEC consolidate and publicize its policy and guidance on how it enforces the FCPA with a view to further harmonize the US approach to fighting foreign bribery; and
- examine how debarment from government contracting could impact FCPA enforcement.

Under standard OECD procedures, the United States has two years to submit a written report to the Working Group on its implementation of the OECD's recommendations and its enforcement efforts.[863] The Working Group plans to follow up on several issues relating to, for instance, conspiracy to commit, and complicity in committing, bribery of a foreign public official.[864]

Also of note, in its Phase 4 evaluation of Iceland's implementation of the OECD's Anti-Bribery Convention related instruments, the OECD Working Group found that detection of foreign bribery, and awareness of related risks, by the Icelandic authorities needs to be significantly improved.[865] Despite being one of the original signatories to the OECD Anti-Bribery Convention in 1997, Iceland did not commence its first foreign bribery investigation until 2020. The OECD Working Group made a range of recommendations to Iceland to improve its capacity to combat foreign bribery.

CONCLUSION AND PREDICTIONS FOR 2021

As we look ahead to 2021, we anticipate that the government, companies, and society generally will continue to deal with the impacts of COVID-19 for at least some if not most of 2021. However, we predict the DOJ and SEC will continue to make FCPA enforcement a priority. Also, whenever businesses start to reopen, we may see an increase in enforcement activity. The unique pressures that have come into play as a result of the COVID-19 pandemic may also result in government investigations into potential bribery, particularly in relation to companies in industries that have

[863] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report, United States, at 7 (Nov. 17, 2020), https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf.
[864] OECD, Implementing the OECD Anti-Bribery Convention, Phase 4 Report, United States, at 113 (Nov. 17, 2020), https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf.
[865] OECD, Iceland should step up efforts to detect and enforce its foreign bribery offences (Dec. 17, 2020), https://www.oecd.org/newsroom/iceland-should-step-up-efforts-to-detect-and-enforce-its-foreign-bribery-offences.htm.

faced significant economic struggles during the pandemic or in industries that have been involved in responding to the COVID-19 pandemic. For instance, it seems likely that authorities will continue to focus in 2021 on companies in the healthcare sector, including life sciences and pharmaceutical companies. Indeed, in many ways the life sciences and pharmaceutical industries present a perfect storm of FCPA government touchpoints from the manufacturing process to regulatory approvals to distribution. Further, because many medical providers outside the United States are government run, FCPA concerns may implicate the point of sale as well as the provision of certain medical treatments which may be subject to reimbursement from government health funds. Because of the difficulty of the landscape from a compliance perspective, we expect that in the near term we will continue to see these same go-to-market FCPA issues.

As we predicted in the last YIR, we expect to continue to see large cross-border investigations, and a continued focus on large resolutions with high-dollar values.

Given the expansive use of agency theory in the *Berko* and *Hoskins* cases discussed above, we expect to see continued efforts by the DOJ and SEC to push the boundaries regarding agency theory. We will also likely discuss the *Hoskins* case in yet another YIR next year, as the appeals continue in that case.

With the government's heightened focus on data in 2020 with the new references to it in the updated 2020 Compliance Guidance and the new compliance language in DPAs regarding data analytics, we expect to see companies more focused on using available data to improve their compliance programs (something we encourage them to do).

Despite the former president's rhetoric around the FCPA, we have largely seen business as usual when it comes to FCPA enforcement over the past four years. As a result, even with the upcoming administration change, like administration changes in the past, we do not anticipate dramatic changes in FCPA enforcement under the new president.

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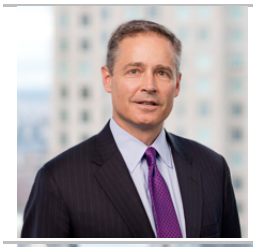

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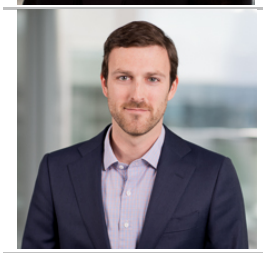

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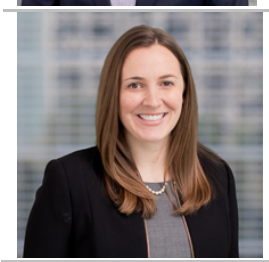

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