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January 2021

FCPA 2020 Year in Review

In 2020, the biggest Foreign Corrupt Practices Act (“FCPA”) headline was the record-shattering global anticorruption enforcement fines and penalties collected by foreign regulators in actions involving a coordinated FCPA resolution. In the United States, the DOJ and the SEC also collected record fines and penalties, but those numbers were eclipsed by the global figures. While the COVID-19 pandemic did not appear to slow the ability to resolve cases that were near resolution, it did impact ongoing corporate and individual investigations due to the complications of conducting witness interviews and collecting certain types of information remotely, including limited access to courts and grand juries for large parts of the year.

On the horizon, we expect continued focus on FCPA enforcement and international coordination under the Biden Administration. In our 2016 Year in Review, we predicted that FCPA enforcement under the Trump Administration would not likely slow down or change dramatically due to the significant resources already dedicated to FCPA enforcement and the large backlog of FCPA investigations. Similarly, we expect FCPA enforcement to remain an enforcement priority in the next administration. The new administration will mean new leadership in key DOJ and SEC posts, but these changes will not likely impact enforcement activity.

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KEY HIGHLIGHTS

There are five key highlights from 2020 Foreign Corrupt Practices Act (“FCPA”) enforcement:

1. Foreign Anticorruption Regulators and Prosecutors Make Their Mark. After years of the U.S. Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”) being the overwhelming leaders in prosecuting foreign bribery, in 2020, foreign regulators and prosecutors showed that they have arrived. In global anticorruption enforcement actions involving a coordinated FCPA resolution, foreign regulators and prosecutors collected approximately \$6.31 billion of the record-smashing \$9.10 billion in worldwide anticorruption penalties, with the U.S. government collecting \$2.78 billion. These figures underscore the trend of increased global anticorruption enforcement and coordination between U.S. regulators and their foreign counterparts.

2. Three Blockbuster FCPA Resolutions Drive a Record \$2.78 Billion in DOJ and SEC Fines and Penalties. 2020 was a banner year for FCPA enforcement as well. The DOJ and the SEC resolved 12 corporate FCPA cases and collected a record \$2.78 billion in fines, penalties, disgorgement, and interest (after accounting for various credits and deductions for related foreign enforcement actions). This was driven by the resolution of three major FCPA investigations, including two of the largest global corruption cases in history.

3. COVID-19 Pandemic Delays Ongoing Corporate Investigations and Prosecutions of Individuals. The ongoing pandemic required the DOJ and the SEC to shift to remote work and postpone many investigative activities that cannot be done remotely. While the pandemic did not appear to slow the ability to resolve cases that were near resolution when this shift occurred, it did impact ongoing corporate and individual investigations due to the complications of conducting witness interviews and collecting certain types of information remotely, including limited access to courts and grand juries for large parts of the year.

4. DOJ and SEC Issued Updated FCPA and Compliance Guidance. The DOJ and the SEC issued a Second Edition of their FCPA Resource Guide. While the updated Resource

Guide did not announce new policies and will not alter the FCPA enforcement landscape, it includes recent DOJ policies and recent case law developments. The DOJ also issued updated guidance on compliance programs that emphasizes the DOJ’s increased focus on incorporating “lessons learned” and data analytics. Meanwhile, in a first, the SEC applied the FCPA’s internal accounting controls provision to an insider trading case and also updated its whistleblower rules.

5. Election of Joe Biden Will Lead to 2021 Leadership Changes at DOJ and SEC, But Expect Continued Focus on FCPA Enforcement. In our 2016 Year in Review, we predicted that FCPA enforcement under the Trump Administration would not likely slow down or change dramatically due to the significant resources already dedicated to FCPA enforcement and the large backlog of FCPA investigations at that time, notwithstanding candidate Trump’s criticisms of the FCPA. Similarly, we expect FCPA enforcement to remain an enforcement priority in the Biden Administration. The new Administration will mean a new Assistant Attorney General overseeing the DOJ’s Criminal Division and new leadership in other key DOJ and SEC posts, but these changes will not likely impact enforcement activity. However, the COVID-19-driven delays in investigations will almost certainly impact FCPA enforcement numbers in 2021 and perhaps beyond.

1. FOREIGN ANTICORRUPTION REGULATORS AND PROSECUTORS MAKE THEIR MARK—INCREASE IN MULTI-JURISDICTIONAL ENFORCEMENT

More Than \$9 Billion in Global Penalties Collected in Cases Involving a Coordinated FCPA Resolution

While the United States continues to lead the world in anticorruption enforcement, in 2020, regulators and prosecutors from Brazil, France, Hong Kong, Singapore, and the United Kingdom collected approximately \$6.31 billion of the record-smashing \$9.10 billion in worldwide anticorruption penalties in actions involving a coordinated FCPA resolution, with the U.S. government collecting approximately \$2.78 billion. This included three of the largest global anticorruption resolutions in history. These jurisdictions enhanced the tools that they may use to combat corruption as well as their enforcement efforts. These figures underscore the trend of increased global anticorruption enforcement and coordination by U.S. regulators and their foreign counterparts.

Figure 1: Total Fines and Penalties Collected in Anticorruption Enforcement Actions Involving a Coordinated FCPA Resolution, 2016–2020

Corporate Actions	2016		2017		2018		2019		2020	
	#	\$	#	\$	#	\$	#	\$	#	\$
DOJ/SEC Total	25	\$2.43B	11	\$1.13B	16	\$1.03B	14	\$2.65B	12	\$2.78B
Non-U.S. Total	2	\$2.74B	3	\$1.39B	2	\$1.91B	2	\$0.37B	4	\$6.31B
Global Total		\$5.17B		\$2.52B		\$2.94B		\$3.02B		\$9.10B
Resolving Authorities	Brazil Netherlands U.S.		Brazil Netherlands Sweden UK U.S.		Brazil France U.S.		Brazil U.S.		Brazil France Hong Kong Singapore UK U.S.	

Increased Global Anticorruption Coordination and Cooperation

In addition to increased global anticorruption enforcement:

- The DOJ and the SEC continued to coordinate with foreign authorities to investigate and prosecute violations of the FCPA. Over the past five years, these agencies publicly acknowledged the assistance of regulators from more than 55 countries and territories. In 2020 alone, the DOJ and the SEC acknowledged cooperation from regulators in France, Guernsey, Hong Kong, Italy, Luxembourg, Malaysia, Singapore, Switzerland, and the United Kingdom.
- Countries around the globe increased or amplified their anticorruption laws and regulatory frameworks. For example, the UK Serious Fraud Office published updated corporate cooperation and compliance programs guidance, the French Ministry of Justice issued a directive encouraging companies to self-report potential corruption violations, and Brazil adopted protections and financial incentives for whistleblowers.
- As foreign corruption resolutions skyrocket outside the United States, in four resolutions in 2020, the DOJ noted the impact of its 2018 No “Piling On” Policy, which seeks to avoid the unnecessary imposition of duplicative fines, penalties, and forfeitures in connection with actions by other federal, state, local, and foreign enforcement authorities that would resolve potential claims arising from the same misconduct. In resolutions with J&F and Vitol, for example, the DOJ agreed to credit approximately \$128 million and \$45 million in penalties that the companies respectively paid to Brazilian authorities. As these and other resolutions from the year indicate, the No “Piling On” Policy led to even more coordination and cooperation between U.S. and foreign authorities.

Figure 2: Top Global Anticorruption Resolutions that Included a Coordinated FCPA Resolution

	Company	Year	US Total	Global Total	Resolving Authorities
1	Airbus SE (Netherlands: Aerospace)	2020	\$294M	\$3.7B	U.S. France UK
2	Odebrecht S.A./Braskem S.A. (Brazil: Construction)	2016	\$253M	\$3.3B	U.S. Brazil Switzerland
3	Goldman Sachs Group, Inc. (U.S.: Financial Services)	2020	\$1.7B	\$2.6B	U.S. Hong Kong Singapore UK
4	J&F Investimentos S.A. (Brazil: Food)	2020	\$155M	\$2.1B	U.S. Brazil
5	Petróleo Brasileiro S.A. (Brazil: Oil and Gas)	2018	\$171M	\$1.7B	U.S. Brazil
6	Siemens AG (Germany: Manufacturing)	2008	\$800M	\$1.6B	U.S. Germany
7	Telia Company AB (Sweden: Telecommunications)	2017	\$699M	\$965M	U.S. Sweden Netherlands
8	Mobile Telesystems PJSC (Russia: Telecommunications)	2019	\$850M	\$850M	U.S.
9	Rolls-Royce plc (UK: Aviation)	2017	\$170M	\$800M	U.S. UK Brazil

Overall, these trends emphasize the importance to companies of preparing for, appropriately responding to, and defending against coordinated multijurisdictional investigations based on the same alleged misconduct. While the enforcement policies against “piling on” seek to promote some measure of proportionality in multi-agency and multijurisdictional enforcement matters, the fact of the matter is that more and more jurisdictions are getting into the enforcement game, increasing the enforcement exposure of multinational corporates. Companies under investigation need to carefully consider and navigate the ever-evolving global landscape, especially given overlapping anticorruption laws and the growing appetite for the enforcement of those laws around the world.

The DOJ and the SEC Continue to Focus on Brazil

Brazil continues to be a focus of anticorruption enforcement for U.S. and Brazilian authorities. The DOJ, the SEC, and

Brazilian authorities continue to cooperate with one another to investigate several major corruption cases, including those related to Brazil’s *Operação Lava Jato* (“Operation Car Wash”) investigation, which began in 2014 and has been extended into early 2021. Operation Car Wash has upended the country. So far, Brazilian authorities have secured more than 200 convictions, signed 19 leniency agreements, and entered into 96 collaboration agreements with companies and individuals, according to Brazil’s Federal Prosecution Service (“MPF”). Meanwhile, several multinational companies have entered into significant resolutions with Brazil, the United States, and other authorities. Indeed, as shown in Figure 2, five of the top 10 largest global anticorruption resolutions in history—including the second, fourth, and fifth largest global anticorruption resolution—have involved coordinated resolutions between U.S. and Brazilian authorities.

In particular, U.S. and Brazil resolutions related to corrupt conduct involving *Petróleo Brasileiro S.A.* (“Petrobras”), Brazil’s state-owned oil and gas company, continues. Following the resolution with Vitol and Sargeant Marine last year, the United States, Brazil, and other foreign regulators entered into resolutions involving a coordinated FCPA resolution with eight

companies related to conduct involving Petrobras, resulting in a global total of \$6.77 billion in fines and penalties. Additionally, enforcement against individuals continues. In 2020, the DOJ indicted one individual and entered into plea agreements with three other individuals for alleged violations of the FCPA and money laundering statutes related to Petrobras conduct.

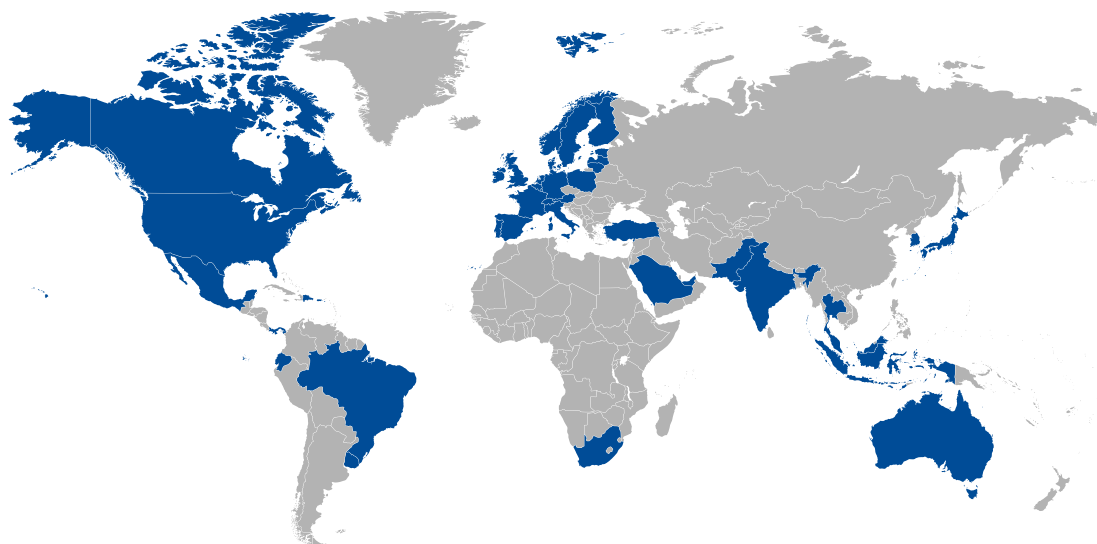
Figure 3: FCPA Resolutions Related to Brazil’s Petrobras, 2014–2020

	Company	Year	U.S. Total	Global Total	Resolving Authorities
1.	Odebrecht S.A. and Braskem S.A. (Brazil: Construction)	2016	\$253M	\$3.3B	U.S. Brazil
2.	Petróleo Brasileiro S.A. (Brazil: Oil and Gas)	2018	\$171M	\$1.7B	U.S. Brazil
3.	SBM Offshore N.V. (Netherlands: Oil and Gas)	2014 – 2017	\$238M	\$820M	U.S. (2017) Brazil (2016) Netherlands (2014)
4.	Keppel Offshore & Marine Ltd (Singapore: Conglomerate)	2017	\$106M	\$422M	U.S. Brazil Switzerland
5.	Technip USA and TechnipFMC plc (UK: Oil and Gas)	2019	\$87.2M	\$296M	U.S. Brazil
6.	Vitol Inc. (U.S.: Financial Services)	2020	\$90.0	\$135M	U.S. Brazil
7.	Samsung Heavy Industries Company Ltd. (South Korea: Engineering)	2019	\$37.8M	\$75.6M	U.S. Brazil
8.	Sargeant Marine Inc. (U.S.: Construction)	2020	\$16.6	\$16.6M	U.S.

Brazil is expected to remain at the forefront of international anticorruption enforcement. In fact, since 2010, Brazil ranks as

the second-most referenced location for misconduct alleged in FCPA enforcement actions.

Figure 4: DOJ and SEC Acknowledged Cooperation from 55 Countries Around the World in Corporate FCPA Resolutions, 2016–2020



From 2016–2020, the DOJ and the SEC publicly acknowledged the assistance of authorities from countries shaded in blue.

2. RECORD YEAR OF CORPORATE FCPA ENFORCEMENT

DOJ and SEC Collected a Record \$2.78B in FCPA Fines and Penalties

The FCPA-related corporate fines and penalties collected by the DOJ and the SEC in 2020 set a new record, surpassing the previous record set in 2019. After accounting for various credits

or deductions for related foreign enforcement actions, the dollar value of FCPA settlements increased to \$2.78 billion, surpassing the \$2.65 billion collected in 2019 and \$2.43 billion in 2016.

Three resolutions, including the largest FCPA resolution in history, comprised 82% of the total amount. This is similar to prior years, where two or more corporate resolutions comprised a significant majority of the total resolution amount.

Figure 5: DOJ and SEC Corporate FCPA Resolutions, 2016–2020

Corporate FCPA Actions	2016		2017		2018		2019		2020	
	#	\$	#	\$	#	\$	#	\$	#	\$
DOJ	11	\$1.33B	9	\$820.6M	6	\$629.7M	7	\$1.62B	8	\$2.10B
SEC	24	\$1.10B	8	\$304.7M	14	\$404.6M	13	\$1.03B	8	\$683.5M
Total¹	25	\$2.43B	11	\$1.13B	16	\$1.03B	14	\$2.65B	12	\$2.78B

Goldman Sachs Entered into the Largest FCPA Settlement in History

In October 2020, in the largest corporate FCPA settlement in history, Goldman Sachs Group, Inc. agreed to pay the DOJ and the SEC a total of \$1.66 billion in combined penalties, disgorgement, and interest (after crediting) to resolve the DOJ's and the SEC's investigations into Goldman Sachs's conduct underwriting bond deals for Malaysia-owned fund 1Malaysia Development Bhd. ("1MDB"). Goldman Sachs also reached parallel agreements with authorities in Hong Kong, Singapore, the United Kingdom, and other authorities in the United States, agreeing to pay these authorities another \$902 million. Combined, the financial institution paid \$2.57 billion in global fines and penalties, making it the second-largest coordinated global anticorruption resolution in history.

Goldman Sachs entered into a deferred prosecution agreement ("DPA") with the DOJ, and its wholly owned subsidiary, Goldman Sachs (Malaysia) Sdn. Bhd., pled guilty to one count of violating the FCPA's antibribery provisions. According to the DPA, Goldman Sachs conspired to violate the FCPA by participating in a scheme to pay more than \$1.6 billion in improper payments to officials in Malaysia and Abu Dhabi to help obtain Goldman's lead role in underwriting approximately \$6.5 billion in three bond deals for 1MDB. According to the DOJ, Goldman Sachs was not required to retain an independent compliance monitor based on Goldman Sachs's remediation, the state of its compliance program, and its agreement to report to the DOJ during the term of the DPA. The DOJ acknowledged assistance from authorities in France, Guernsey, Malaysia, Singapore, Switzerland, and the United Kingdom.

Figure 6: Goldman Sachs Global Resolution, Oct. 2020

	Country	Agency	Fine (after crediting)
1	U.S.	DOJ	\$1.26B
2	U.S.	SEC	\$400M
3	U.S.	Board of Governors Federal Reserve	\$154M
4	U.S.	New York State Department of Financial Services	\$150M
5	UK	Financial Conduct Authority	\$63M
6	UK	Prudential Regulation Authority	\$63M
7	Singapore	Attorney General's Chambers	\$122M
		Monetary Authority of Singapore	
		Commercial Affairs Department of Singapore Police	
8	Hong Kong	Hong Kong Securities and Future Commission	\$350M
		Total	\$2.57B

In addition to these criminal charges, the DOJ has sought the recovery of \$2.1 billion in assets for Malaysia associated with, and traceable to, the 1MDB money laundering and bribery scheme and has recovered or helped recover more than \$1 billion in assets to date.

Previously, in August 2020, Goldman Sachs settled with the Government of Malaysia and 1MDB. The terms of that settlement required the firm to pay a total of \$2.5 billion and provide a \$1.4 billion asset recovery guarantee. The DOJ and the SEC each found Goldman Sachs owed \$606 million in disgorgement but agreed to credit Goldman Sachs for the full amount based on the resolution with the Malaysian government.

There have been several individual enforcement actions related to this matter. Previously, the former Southeast Asia Chairman of Goldman Sachs pled guilty to conspiring to launder money and to violate the FCPA, and separately settled with the SEC. Additionally, the former head of investment banking for Goldman Sachs Malaysia was charged with conspiring to launder money and to violate the FCPA. He was extradited from Malaysia to the United States and is scheduled to stand trial in March 2021. The DOJ also indicted Jho Low, the Malaysian financier at the center of the scheme, for conspiracy to commit money laundering and to violate the FCPA. Low remains a fugitive. Finally, former Malaysian Prime Minister Najib Razak was convicted of corruption charges in Malaysia.

Novartis Paid \$345 Million to Resolve Allegations of Improper Payments to Health Care Providers in Three Countries

Swiss-based global pharmaceutical company Novartis AG agreed to pay a combined \$345 million to the DOJ and the SEC to resolve a corruption investigation related to payments to health care providers in Greece, South Korea, and Vietnam to boost sales of Novartis products.

A wholly owned subsidiary of Novartis and a former subsidiary of Novartis entered into separate DPAs with the DOJ and agreed to pay \$225 million and \$8.9 million respectively, for a total \$233 million in criminal penalties. According to the first DPA, Novartis's Greek subsidiary admitted to participating in a scheme to make improper payments to employees of state-owned and state-controlled hospitals in Greece to increase prescriptions of

Novartis products. Separately, according to the second DPA, the former subsidiary admitted to engaging in a scheme to make and falsely record improper payments in Vietnam. According to the DOJ, neither entity was required to engage an independent compliance monitor because of the state of their compliance programs and their agreement to report to the DOJ.

Separately, Novartis entered into a cease and desist order with the SEC for \$112 million to resolve SEC allegations that it violated the FCPA's books and records and internal controls provisions for the conduct in Greece and Vietnam, as well as additional conduct in South Korea. The SEC acknowledged the assistance and cooperation of authorities in Switzerland and the United Kingdom.

Airbus Entered Into the World's Largest Anticorruption Resolution in History to Resolve Bribery Allegations in More Than 20 Countries, Paying \$294 Million to U.S. Authorities

In the largest global anticorruption resolution in history, European multinational aerospace corporation Airbus SE ("Airbus") agreed in January 2020 to pay a combined \$3.68 billion to—and enter into DPAs with—the DOJ and authorities in France and the United Kingdom to resolve bribery allegations in more than 20 countries around the world. Airbus agreed to monitoring by France's anti-corruption agency for a three-year term.

According to admissions in the resolution documents, Airbus paid at least \$150 million and offered at least \$150 million more in bribes and improper payments to aviation executives and foreign government officials around the world to purchase Airbus airplanes and satellites in violation of France's Sapin II law, the UK Bribery Act ("UKBA"), and the FCPA over the span of 10 years. Specifically, the company's Strategy and Marketing Organization disguised the true purpose of Airbus's business partners and consultants in a variety of ways, including fake invoices for services never performed, fake activity reports, oral agreements, fake nonreimbursable loans, and indirect payments to third-party intermediaries ("TPIs"). The company maintained spreadsheets with annotations that showed the actual and intended recipients of the payments to TPIs. Airbus also offered improper gifts, travel, and entertainment to foreign government officials.

Figure 7: Airbus Global Resolution, Jan. 2020

	Authority	Total (after credits)	Notes
1	France (PNF)	\$2.3B ²	<ul style="list-style-type: none"> • Judicial Public Interest Agreement (<i>Convention Judiciaire d'Intérêt Public</i> ("CJIP")), which is France's equivalent of a DPA • Covers conduct in China, Colombia, Nepal, Russia, Saudi Arabia, South Korea, Taiwan, and the UAE • Credit for "exemplary" cooperation, its thorough internal investigation, and remediation (50% fine reduction) • Three-year monitorship by the French Anticorruption Agency ("AFA"), which includes targeted audits of Airbus's compliance program and reporting requirements
2	UK (SFO)	\$1.09B ³	<ul style="list-style-type: none"> • DPA (five counts for failure to prevent bribery) • Covers conduct in Ghana, Indonesia, Malaysia, Sri Lanka, and Taiwan • Credit for cooperation, remediation, and willingness to resolve the case through settlement (50% fine reduction)
3	U.S. (DOJ)	\$294.5M ⁴	<ul style="list-style-type: none"> • DPA (conspiracy to violate the FCPA) • Covers conduct in China • Full cooperation and remediation credit (25% fine reduction) • No credit for voluntary self-disclosure
	Total	\$3.68B	

Airbus does not trade equity securities on a U.S. national exchange. The DOJ asserted jurisdiction over Airbus's conduct because Airbus employees and agents sent emails while in the United States and provided Chinese officials with luxury travel in the United States. The DOJ acknowledged that its "territorial jurisdiction over the corrupt conduct [was] limited."

The multijurisdictional investigation was coordinated between the countries. In January 2017, the United Kingdom's Serious Fraud Office ("SFO") and France's National Financial Prosecution Office ("PNF") entered into a Joint Investigation

Team ("JIT") Agreement to coordinate their investigations. The French authorities controlled the supply of documents to the SFO to ensure compliance with the French Blocking Statute. In December 2018, the DOJ opened its investigation after Airbus disclosed corruption-related conduct. The DOJ was not a party to the JIT but acknowledged and expressed its appreciation of the significant assistance provided by the PNF and the SFO. Following the resolution, in June 2020, French authorities announced that they would be more "aggressive" in enforcing French anticorruption laws against non-French companies, following a so-called "U.S. model" of enforcement.

Figure 8: DOJ and SEC Corporate FCPA Resolutions, 2020

	Company	Date	DOJ (\$M)	SEC (\$M)	Total (\$M)	Global Coordinated Resolution
1.	Airbus SE (Netherlands: Aerospace)	Jan. 31	\$294.3	-	\$294.3	\$3.68B
2.	Cardinal Health, Inc. (U.S.: Health Care)	Feb. 28	Declination	\$8.8	\$8.8	
3.	Eni S.p.A. (Italy: Oil and Gas)	Apr. 17	Declination	\$24.5	\$24.5	
4.	Novartis AG (Swiss: Pharmaceuticals)	Jun. 25	\$233.9	\$112.8	\$346.7	
5.	Alexion Pharmaceuticals Inc. (U.S.: Pharmaceuticals)	Jul. 2	Declination	\$21.5	\$21.5	
6.	World Acceptance Corp. (U.S.: Financial Services)	Aug. 6	Declination	\$21.7	\$21.7	
7.	Herbalife Nutrition Ltd. (U.S.: Nutrition)	Aug. 28	\$55.7	\$67.3	\$123.0	
8.	Sargeant Marine Inc. (U.S.: Construction)	Sept. 22	\$16.6	-	\$16.6	
9.	J&F Investimentos S.A. (Brazil: Food)	Oct. 14	\$128.3	\$26.9	\$155.2	\$2.14B
10.	Goldman Sachs Group, Inc. (U.S.: Financial Services)	Oct. 22	\$1,263.1	\$400.0	\$1,663.1	\$2.56B
11.	Beam Suntory Inc. (U.S.: Beverages)	Oct. 27	\$19.5	Resolved in 2018 ⁵	\$19.5	
12.	Vitol Inc. (U.S.: Financial Services)	Dec. 3	\$90.0	-	\$90.0	\$135.0M
	Total		\$2,101.4	\$683.5	\$2,784.9	\$9.10B

DOJ Declined to Prosecute At Least 12 Companies

Under its FCPA Corporate Enforcement Policy, the DOJ incentivizes companies to voluntarily self-disclose conduct that might violate the FCPA, cooperate, remediate, and pay any applicable disgorgement in exchange for a presumption of a declination, absent aggravating circumstances involving the seriousness of the offense or the nature of the offender. While there are no guarantees on the outcome of a DOJ investigation, the DOJ touts its FCPA Corporate Enforcement Policy as creating a strong incentive for companies to self-disclose. In 2020, 12 companies publicly reported receiving a declination from the DOJ, including four companies that reached resolutions with the SEC relating to the same conduct.

One of the 12 DOJ declinations was issued pursuant to the DOJ's FCPA Corporate Enforcement Policy. In August 2020, the DOJ announced that it had declined to prosecute World Acceptance Corporation ("WAC") for improper payments paid by a TPI of its Mexican subsidiary to Mexican union officials to obtain business.⁶ The declination was attributed to WAC's

prompt, voluntary self-disclosure; full and proactive cooperation; full remediation; and decision to discontinue relationships with third parties in Mexico involved in the misconduct, as well as the fact that WAC agreed to disgorge all ill-gotten gains to the SEC in a related FCPA resolution with the SEC.⁷

3. IMPACT OF COVID-19 PANDEMIC ON FCPA ENFORCEMENT

Impact on Corporate Investigations and Resolutions

The DOJ and the SEC both acknowledged that while they remain committed to continuing to investigate and prosecute FCPA violations, the pandemic impacted their ability to conduct FCPA investigations. The pace of ongoing investigations has slowed data and document collections outside of the United States, witness interviews, company meetings, and other investigation tasks. The pandemic also impacted defense counsel's continued need to meet with clients and witnesses in person despite the DOJ's and the SEC's willingness to conduct witness

interviews remotely. The DOJ and the SEC also acknowledged strains on foreign cooperation due to the effects of the pandemic, particularly in jurisdictions where the agencies have less-developed relationships with their enforcement counterparts.

By contrast, as demonstrated by the record year of enforcement, there were no significant delays in investigations for which most or all of the investigative activity was already complete, primarily because counsel were able to negotiate resolutions on a remote basis with the DOJ and the SEC. Of the 12 corporate FCPA resolutions involving the DOJ and/or the SEC in 2020, 10 occurred after the outbreak of the pandemic in the United States in March; these 10 resolutions garnered close to 90% of the \$2.78 billion in fines and penalties collected by the DOJ and the SEC during the year. The ultimate impact of COVID-19 on FCPA enforcement investigations, while not fully apparent in this year's enforcement statistics, likely will not be revealed for several more years.

Impact on Individual FCPA Enforcement

It is evident that the COVID-19 pandemic significantly impacted the pace of individual FCPA enforcement. The pandemic, among other things, closed courts, suspended grand juries, and limited defense counsel's ability to meet with clients and witnesses, particularly non-U.S. clients, in person. Lack of grand juries and limited access to courts meant no new criminal indictments or court-ordered subpoenas. In ongoing actions against individuals, judges delayed sentencing hearings and other court proceedings and granted early or home release.

Figure 9: DOJ and SEC Individual FCPA Enforcement Actions, 2016–2020

Type of Action	2016	2017	2018	2019	2020
Indictments	2	4	13	16	7
Pleas	7	11	6	9	8
DOJ – Total	9	15	19	25	15
SEC – Total	8	7	4	6	3

In 2020, the DOJ announced a total of 15 FCPA indictments and guilty pleas involving individuals, while the SEC announced three FCPA individual actions. This is a decline from the 2019 figures for individual actions—25 for the DOJ and six for the SEC. As noted above, this decline is likely due in large part to difficulties in completing individual investigations, empaneling grand juries, and accessing the courts to enter plea agreements.

The only FCPA-related trial occurred in January 2020, prior to the onset of the pandemic in the United States. Following a one-week trial, Donville Inniss, a former member of Barbados's parliament, was found guilty of two counts of money laundering and one count of conspiracy to commit money laundering. Sentencing is scheduled for January 2021.

DOJ and SEC Still Expect Companies to Voluntarily Self-Disclose Potential FCPA Misconduct and Maintain Adequate Controls

The pandemic has impacted many anticorruption compliance-related functions, such as risk assessments, internal investigations, and monitoring and auditing. It remains to be seen whether the pandemic-related impacts to these corporate functions coupled with changes to a company's risk profile will lead to an uptick in FCPA investigations and enforcement activity.

Notwithstanding the pandemic, the DOJ and the SEC still expect companies to maintain proper internal controls and an effective compliance program to address corruption risk. Notably, the DOJ warned that simply using the global health crisis as a defense to noncompliance is insufficient if there are means to offset the impacts of the pandemic.

4. DOJ AND SEC FCPA GUIDANCE UPDATES

DOJ and SEC Published the Second Edition of Their FCPA Resource Guide

In July 2020, the DOJ and the SEC published a second edition of the Resource Guide to the Foreign Corrupt Practices Act ("Resource Guide"), almost eight years after the first edition, to provide additional guidance to companies and individuals on navigating the FCPA.⁸ While the updated Resource Guide does not announce new policies and will not alter the FCPA enforcement landscape, it is a useful resource and demonstrates the DOJ's and the SEC's continued commitment to providing companies with guidance for complying with the FCPA. The Resource Guide represents the government's views on the law and is nonbinding on the enforcement agencies. The government's enforcement policies, such as when to issue a declination, remain open to interpretation and prosecutorial discretion.

Below is a summary of the key updates in the second edition of the Resource Guide:

Figure 10: Summary of the Four DOJ Policies and Memoranda Added to the Resource Guide

	DOJ Policy of Memorandum	Description
1	DOJ FCPA Corporate Enforcement Policy ⁹	This November 2017 DOJ policy (updated in April 2019) incentivizes companies to self-disclose, cooperate, remediate, and pay any applicable disgorgement by offering the possibility of a declination by the DOJ.
2	Memorandum on the Selection of Monitors in DOJ Criminal Division Matters ¹⁰	This October 2018 memorandum sets forth the DOJ Criminal Division's principles for determining whether a monitor is needed. It states that a monitor typically should not be required and instead should be "the exception, not the rule."
3	DOJ Policy on Coordination of Corporate Resolution Penalties ¹¹	The so-called Anti-Piling On Policy, released in May 2018, states that the DOJ will coordinate with its U.S. and foreign counterparts when entering into a resolution to avoid "piling on" penalties.
4	DOJ Criminal Division Guidance on the Evaluation of Corporate Compliance Programs ¹²	The Resource Guide now contains a citation to the DOJ's April 2019 compliance program guidance (updated in June 2020), which describes the factors the DOJ considers when evaluating the effectiveness of a company's compliance program for the purposes of determining an appropriate resolution of a DOJ matter.

- Incorporates Recent DOJ Policies.** The Resource Guide's sections on the DOJ's guiding principles of enforcement include four FCPA-related DOJ policies and pronouncements issued since 2017.
- Updated Antibribery and Accounting Provisions Sections Reflect Case Law Since 2012**

 - Definition of Instrumentality of a Foreign Government.** The FCPA defines "foreign official" as "any officer or employee of a foreign government or instrumentality thereof." Based on a 2014 ruling from the U.S. Court of Appeals for the Eleventh Circuit, the Resource Guide explains that "instrumentality" means "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own."¹³ The Resource Guide includes a list of factors to consider when determining whether a foreign government "controls" an entity.
 - Types of Persons Liable for Conspiring or Aiding and Abetting.** The Resource Guide references a recent ruling of the U.S. Court of Appeals for the Second Circuit (holding that a foreign national who is not an agent, officer, director, employee, or shareholder of a U.S. domestic

concern and who is acting outside the United States cannot be liable for conspiring to violate the FCPA or aiding and abetting FCPA violations).¹⁴ It also references another case from a U.S. District Court for the Northern District of Illinois (holding that individuals who do not "belong to the class of individuals capable of committing a substantive FCPA violation" could be criminally liable for conspiracy to violate the FCPA antibribery provisions, and aiding and abetting a violation).¹⁵ These two cases reached different conclusions on the question of whether individuals not directly covered by the antibribery provisions can be criminally liable for conspiring to violate those provisions or for aiding and abetting another person's violation of those provisions. The Resource Guide asserts the DOJ's and the SEC's view that individuals not directly covered by the FCPA antibribery provisions could nevertheless be liable for conspiring to violate, or aiding and abetting the violation of, the antibribery provisions, except in the Second Circuit. It also asserts the government's view that the FCPA's accounting provisions apply to "any person" and are not subject to any limitations.

- Scope of the Antibribery Provisions' Local Law Defense.** The Resource Guide references a recent case in which the court rejected the individual

defendant’s request for a jury instruction on the “local law” defense—an affirmative defense under the FCPA antibribery provisions.¹⁶ Under this defense, a person cannot violate the FCPA if the payment was explicitly lawful under written foreign law. However, in this matter, the court found that the defense does not apply if a person could not be prosecuted in the foreign country because of either a technicality or a provision in the foreign law that “relieves” the person of criminal responsibility.

there is no obvious ill-gotten gain or no identifiable victims to whom funds should be returned. Before *Liu*, the SEC collected hundreds of millions of dollars of disgorgement in FCPA matters. It remains to be seen how *Liu* will impact FCPA resolutions in the future. Alleged violations of the FCPA antibribery and accounting provisions typically do not involve identifiable victims who could be compensated by a return of funds, and the SEC may no longer be able successfully to seek disgorgement in such cases.

• **New Section on Civil Forfeiture and Disgorgement Reflects Two Recent Supreme Court Cases**

- ***Kokesh v. SEC (U.S. Supreme Court, 2017)***. The Resource Guide notes that in *Kokesh v. SEC*, the Supreme Court ruled that the civil disgorgement remedy is a “penalty” and therefore subject to a five-year statute of limitations under 28 U.S.C. § 2462.¹⁷
- ***Liu v. SEC (U.S. Supreme Court, 2020)***. The Resource Guide acknowledges that under the Supreme Court’s recent decision in *Liu v. SEC*, disgorgement as a general matter is only permissible as equitable relief when disgorged profits do not exceed a wrongdoer’s net profits and the recovered funds are paid to victims of the wrongdoing.¹⁸
- The Resource Guide, however, does not discuss the government’s view on the impact of *Kokesh* and *Liu* on civil FCPA resolutions moving forward. *Liu* sharply limits the SEC’s ability to seek disgorgement in cases where

DOJ Issued Slightly Updated Guidance on How It Evaluates Corporate Compliance Programs

In June 2020, the DOJ released an updated version of its corporate compliance guidance document, Evaluation of Corporate Compliance Programs, which was published originally in 2017 and last updated in April 2019.¹⁹ The updated guidance remains substantially the same as the 2019 version but offers some additional guidance and nuance from the DOJ concerning the factors the DOJ considers when evaluating the effectiveness of a corporation’s compliance program at the time of an offense and at the time of resolution, for purposes of determining the appropriate resolution of an FCPA matter.

Like the prior version, the updated guidance directs federal prosecutors to make a “reasonable, individualized determination” when evaluating a corporation’s compliance program, taking into consideration the corporation’s “size, industry, geographic footprint, and regulatory landscape.” Specifically, the updated guidance instructs prosecutors to consider three questions when evaluating a company’s compliance program, as summarized in the table below.

Figure 11: Summary of DOJ “Evaluation of Corporate Compliance Programs” Guidance, June 2020

I. Is the corporation’s compliance program well designed?	II. Is the program being implemented effectively?	III. Does the corporation’s compliance program work in practice?
<ul style="list-style-type: none"> A. Risk Assessment B. Policies and Procedures C. Training and Communications D. Confidential Reporting Structure and Investigation Process E. Third-Party Management F. Mergers & Acquisitions 	<ul style="list-style-type: none"> A. Commitment by Senior and Middle Management B. Autonomy and Resources C. Incentives and Disciplinary Measures 	<ul style="list-style-type: none"> A. Continuous Improvement, Periodic Testing, and Review B. Investigation of Misconduct C. Analysis and Remediation of Any Underlying Misconduct

The updated guidance also reflects the government’s increased focus on:

- **Root Cause Analysis into Misconduct:** The DOJ expects a company to update its compliance program based on a “root cause” analysis of any underlying misconduct and “lessons learned.”
- **Data Analytics and Tracking:** The government asks about the use of data analytics in a company’s compliance efforts, including whether the compliance program has adequate access to data tools to evaluate the program, and whether the program is tracking and applying information learned from risk assessments.
- **Ongoing Third-Party Monitoring:** The guidance emphasizes the need for companies to conduct third-party monitoring on an ongoing basis, rather than merely at the time third parties are onboarded.

No FCPA Corporate Monitors Imposed in 2020

Despite a record-breaking year of FCPA enforcement, the DOJ and the SEC imposed no corporate monitors in 2020. This is illustrative of an overall trend toward fewer FCPA monitors. During the 2000s, the DOJ imposed monitors in approximately 50% of FCPA corporate cases. Since 2010, that rate has dropped to approximately 25%.

Three factors potentially impacted this result. First, in October 2018, the Assistant Attorney General in charge of the Criminal Division announced new guidance that formalized the factors the DOJ must consider when deciding whether to require a corporate monitor in Criminal Division matters.²⁰ The new guidance stated that the imposition of a monitor should be “the exception, not the rule.” Since this guidance was issued, the U.S. government has imposed monitors in less than 10% of FCPA corporate enforcement actions, including none in 2020. One senior DOJ official stated part of the reason for the downward trend is that the DOJ has “seen greater sophistication in terms of compliance” at companies, lessening the need for a monitor.²¹

Another trend explaining the reduction in U.S.-imposed monitors is the emergence of deference to a foreign regulator’s monitoring. In two resolutions, the DOJ agreed to monitoring by a foreign regulator to ensure compliance with the DOJ’s DPA. In

Airbus, the DOJ deferred to three years of anticorruption monitoring by the French Anticorruption Agency (“AFA”) to ensure compliance with the terms of the DPAs, including compliance program requirements and audits mandated by the DPAs. The DOJ and the SFO did not impose a separate monitoring. And in *J&F*, the DOJ deferred to the Brazilian authorities’ implementation of an independent commission responsible for monitoring and reporting on internal investigations and compliance audits with ongoing reporting to the Brazilian authorities.

Figure 12: Number of DOJ or SEC Corporate Monitors Imposed in Connection with an FCPA Resolution, 2016–2020

Type of Action	2016	2017	2018	2019	2020
Number of DOJ or SEC Corporate Monitors	7	3	1	3	0
Number of DOJ/SEC FCPA Corporate Resolutions	25	11	16	14	12
Percentage of Total	28%	33%	13%	21%	0%

DOJ Released First FCPA Advisory Opinion in Six Years

In August 2020, the DOJ issued an FCPA Opinion Procedure Release, its first since November 2014.²² Through this procedure, the DOJ provides advisory opinions on whether an anonymous requestor’s prospective conduct would violate the FCPA. In this opinion, the DOJ informed a U.S.-based investment advisor that it would not initiate an FCPA enforcement action in response to fees that it intended to pay \$237,500 to a subsidiary of a foreign, government-owned investment bank for services related to the sale of assets. The DOJ said it would not bring an enforcement action because the payments were going to the bank’s unit and not to any individual, the payments were transparent, and the company received assurances from the foreign investment bank’s compliance officer that the payments would not be forwarded to any other entity or individual. Based on these facts, the DOJ concluded there was no indication the payment was intended to corruptly influence any foreign official.

SEC Responds to Criticism About Its Use of the Internal Controls Provision

In October 2020, in a “first of its kind” case, the SEC brought an enforcement action against an issuer based on its stock buy-back program.²³ Rather than charging fraud, the SEC brought charges based on internal controls deficiencies over financial

reporting under the FCPA's internal accounting controls provision. This both represents an expansion of the law by the SEC and provides an important avenue out of an investigation for something other than fraud for the issuer. In November 2020, however, two SEC commissioners said in a dissent that the SEC applied an "unduly broad" view to the FCPA's internal controls provision to this case.²⁴ In their view, the accounting controls provision applies only to ensure financial statements are accurate, and the matter did not show the company's controls were ineffective as to accounting. They cautioned that applying the provision more broadly may go "beyond the realm of accounting controls."²⁵

Responding to criticisms about the SEC's use of this provision, the SEC's enforcement co-chief and the chief of the FCPA unit noted that several SEC divisions play a role in deciding that an application of the FCPA's internal controls provision is "appropriate."²⁶ It remains to be seen whether this matter represents a shift in SEC enforcement toward a more expansive view of the FCPA's internal controls provision.

SEC Expands Whistleblower Program

In September 2020, the SEC adopted several amendments to the rules governing its whistleblower program and published guidance regarding the process for determining award amounts for eligible whistleblowers.²⁷ Established in 2012, the program empowers the SEC to reward individuals who voluntarily provide original information about a violation of the federal securities laws that leads to a successful enforcement action. Whistleblower awards may total no less than 10% and no more than 30% of monetary sanctions collected in the covered and related actions.

To date, the SEC has announced awards totaling \$523 million to 97 whistleblowers in 80 enforcement actions, of which \$120 million was awarded in 2020. One of the 2020 awards was given to a whistleblower who provided information connected to a 2017 FCPA settlement involving a medical-device company. Whistleblower tips led to the imposition of \$2.5 billion in financial remedies as a result of successful enforcement actions since the inception of the program, of which \$750 million has been earmarked for harmed investors.

The amendments include several noteworthy changes to, or clarifications of, the rules governing the program:

- The amended rules allow awards for information leading to a deferred or nonprosecution agreement by the DOJ in a parallel proceeding or a settlement by the SEC outside of a judicial or administrative proceeding to address violations.
- The amended rules establish a "multiple recovery rule," clarifying that recovery of an award from the SEC is not available when the SEC determines that a separate whistleblower award program more appropriately applies.
- The amendments establish a process to presumptively award amounts at the top end of the statutory range when the maximum award is \$5 million or less. Awards under \$5 million comprise 75% of all awards since the program's inception.
- The amendments require a whistleblower to submit a written report to the SEC as a prerequisite for award eligibility, confidentiality, and retaliation protection. This amendment results from a Supreme Court decision limiting retaliation protection for persons who report internally to their employer before reporting to the SEC.

Nothing in the adopted amendments or the interpretive guidance changes the bottom line—the SEC whistleblower program continues to offer substantial financial incentives for whistleblowers, including current or former employees, to report information about potential violations of the securities law. In its most recent report to Congress, the Office of the Whistleblower noted that 85% of award recipients, who were employees or former employees of the company about which they were reporting, had reported internally to the company. In prior years, the SEC also brought 11 anti-retaliation enforcement actions against companies or individuals who impeded a whistleblower's efforts to report to the SEC.²⁸ The volume of tips has increased year after year since the program's inception, with more than 7,000 tips received by the SEC in Fiscal Year 2020, which ended September 30, 2020, including more than 200 FCPA tips.²⁹

Figure 13: Number of Whistleblower Tips to the SEC's Whistleblower Program, SEC FY2016–FY2020

	2016	2017	2018	2019	2020
Number of Whistleblower Tips	4,218	4,484	5,282	5,212	6,911
Number of FCPA Tips	238	210	202	200	208

5. WHAT TO EXPECT UNDER THE BIDEN ADMINISTRATION

In our 2016 FCPA Year in Review, notwithstanding candidate Trump's prior criticisms of the scope of FCPA enforcement, we predicted that FCPA enforcement under the Trump Administration would not change due to the ongoing involvement of career DOJ prosecutors and SEC enforcement attorneys who handle the day-to-day management of FCPA enforcement, the significant resources already dedicated to FCPA enforcement, and the large backlog of FCPA investigations.

While the soon-to-be-installed Biden Administration has not publicly expressed any particular policy on FCPA enforcement, we do not expect the inauguration of President Biden to usher in dramatic changes to the DOJ's and the SEC's anticorruption enforcement priorities. Accordingly, we expect continued, if not increased, focus on FCPA enforcement and international anticorruption coordination.

After the new administration is sworn in, it will soon appoint new enforcement leadership, including a new Attorney General, Assistant Attorney General overseeing the Criminal Division, SEC Chairperson, and SEC Director of Enforcement. These changes will not likely impact ongoing enforcement activity. As in the past, the career prosecutors and enforcement attorneys who handle the day-to-day management of FCPA cases under the supervision of enforcement leadership are expected to continue enforcing the FCPA at the same level.

We do expect that the COVID-19 pandemic-related delays in investigations will have some impact on FCPA enforcement numbers over the next several years, since FCPA cases typically take years for the government to investigate and resolve. Therefore, any decline in enforcement activity will likely be attributable in large part to the impact of the pandemic, as opposed to any change in enforcement priorities.

Meanwhile, multinational companies will continue to be subject to anticorruption enforcement by authorities in other countries across the world. As described above, non-U.S. enforcement has increased, and companies should expect continued expansion of anticorruption enforcement efforts and outcomes that the United States has seen over the past two decades.

CONCLUSION

2020 was a watershed year for FCPA enforcement and for anti-bribery enforcement around the globe. Global anticorruption enforcement actions involving an FCPA resolution totaled more than \$9 billion in fines and penalties, highlighting the sharp increase in international anticorruption enforcement and coordination with U.S. authorities. The DOJ and the SEC resolved a total of 12 corporate enforcement actions and collected a record amount of \$2.78 billion in corporate fines and penalties.

Meanwhile, the COVID-19 pandemic slowed the pace of corporate and individual FCPA investigations and enforcement actions. Under the Biden Administration, companies should expect continued anticorruption enforcement in the United States and abroad, and they should therefore ensure that their policies and procedures are appropriately designed based on recent updates to DOJ guidance and effectively implemented to prevent, identify, investigate, and remediate any bribery or other corruption issues as they arise.

With even more domestic and global anticorruption enforcement activity and international cooperation on the horizon, companies currently under, or facing the risk of, investigation must be prepared to deal with enforcement agencies and the consequences of potential enforcement actions in multiple countries.

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To learn more about Jones Day's experience in counseling companies and individuals that have received an allegation of corruption or have become the subject of government investigation, please visit our [website](#).

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ENDNOTES

- 1 A concurrent DOJ and SEC corporate FCPA resolution is counted as one total corporate FCPA enforcement action.
- 2 The PNF imposed a fine of \$2.3B (€2.08B). The PNF credited the fine Airbus paid the DOJ for its FCPA-related offenses because the DOJ's DPA also covers related corrupt conduct in China.
- 3 Airbus's \$1.09B (€990.63M) payment to the SFO breaks down as follows: \$649M (€585.94M) disgorgement; \$441M (€398M) fine; and \$77M (€6.99M) to cover the SFO's "reasonable" investigation costs.
- 4 For the FCPA-related conduct, the DOJ imposed a criminal penalty of \$2.09 billion. The DOJ agreed to credit amounts paid to the PNF up to \$1.8 billion.
- 5 In July 2018, Beam Suntory Inc. entered into a resolution with the SEC agreeing to pay the SEC \$8.18 million dollars to resolve the SEC's investigation into the same issues.
- 6 [Letter from DOJ re: World Acceptance Corporation](#), Aug. 5, 2020.
- 7 *Id.*
- 8 The DOJ and the SEC, [A Resource Guide to the FCPA, Second Edition](#).
- 9 DOJ, [FCPA Corporate Enforcement Policy](#).
- 10 DOJ Criminal Division, [Memorandum on the Selection of Monitors in DOJ Criminal Division Matters](#), Oct. 11, 2018.
- 11 DOJ Office of the Deputy Attorney General, [Policy on Coordination of Corporate Resolution Penalties](#), May 9, 2018.
- 12 DOJ Criminal Division, [Guidance on the Evaluation of Corporate Compliance Programs](#), updated June 2020.
- 13 See *United States v. Esquenazi*, 752 F.3d 912, 925 (11th Cir. 2014).
- 14 *United States v. Hoskins*, 902 F.3d 69, 76–97 (2d Cir. 2018).
- 15 *United States v. Firtash*, 392 F. Supp. 3d 872, 889 (N.D. Ill. 2019).
- 16 Trial Transcript at 715–18, *United States v. Ng Lap Seng*, No. 15-CR-706 (S.D.N.Y. July 26, 2017).
- 17 *Kokesh v. SEC*, 137 S. Ct. 1635 (2017).
- 18 *Liu v. SEC*, 140 S.Ct. 1936 (2020).
- 19 DOJ Criminal Division, [Guidance on the Evaluation of Corporate Compliance Programs](#), updated June 2020.
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- 21 [FCPA Docket: US Officials on Monitorships, Internal Controls, Global Investigations Review](#), Dec. 4, 2020.
- 22 DOJ Opinion Procedure Release, FCPA Review, No. 20-01.
- 23 [Exchange Act Release No. 90208](#) (Oct. 15, 2020).
- 24 SEC, [Statement of Commissioners Hester M. Peirce and Elad L. Roisman](#), Nov. 13, 2020.
- 25 *Id.*
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- 27 SEC Press Release, ["SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program,"](#) Sept. 23, 2020.
- 28 SEC, [2020 Annual Report to Congress, Whistleblower Program](#), Nov. 16, 2020.
- 29 *Id.*

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