

WEBINAR



WILMER CUTLER PICKERING HALE AND DORR LLP

*Foreign Corrupt Practices Act and
Global Anti-Corruption:
2020 Year-in-Review and
Predictions for 2021*

January 28, 2021

Speakers: Lori Echavarria, Jay Holtmeier, Kimberly Parker,
Erin Sloane and John Walsh

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WEBINAR

Speakers



Lori Echavarria
Partner
WilmerHale



Jay Holtmeier
Partner
WilmerHale



Kimberly Parker
Partner
WilmerHale



Erin Sloane
Partner
WilmerHale



John Walsh
Partner
WilmerHale



Agenda

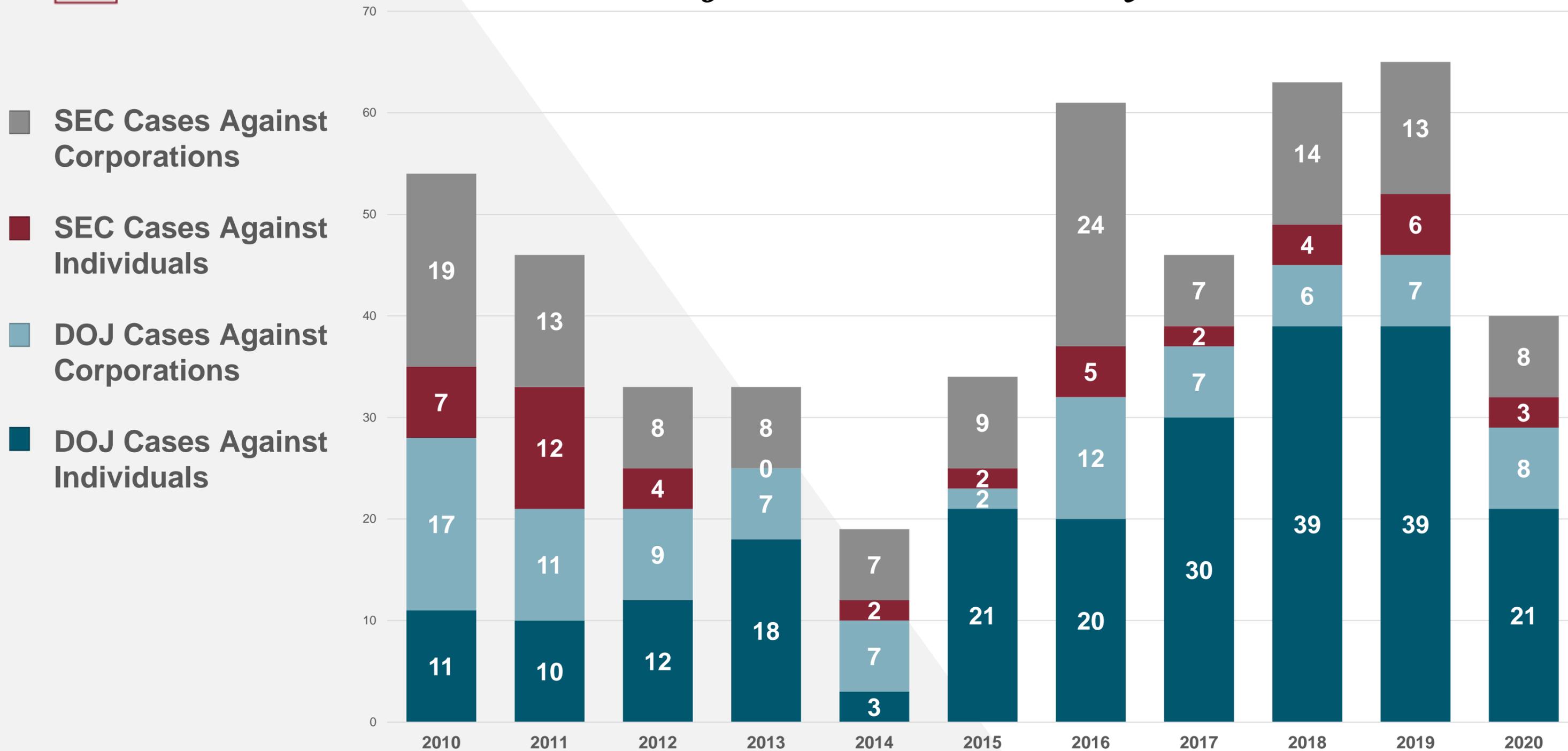
- I. 2020 Enforcement Trends
- II. Recent Government Developments and Policy Updates
- III. Key Investigation-Related Developments
- IV. Legal Developments
- V. Collateral Actions
- VI. International Developments
- VII. Predictions for 2021
- VIII. Compliance Takeaways



I. 2020 Enforcement Trends



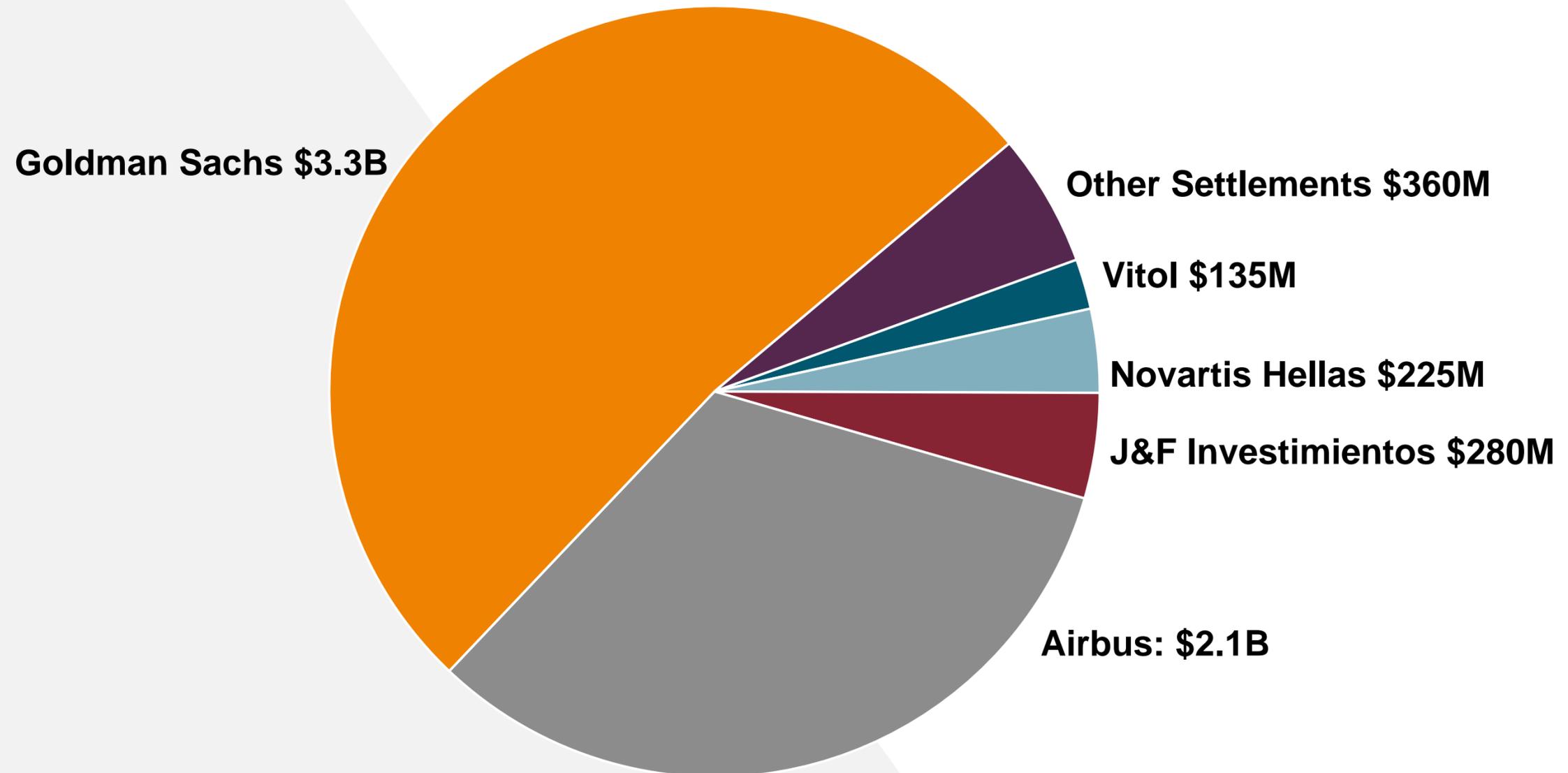
Modest Decline in Enforcement Activity





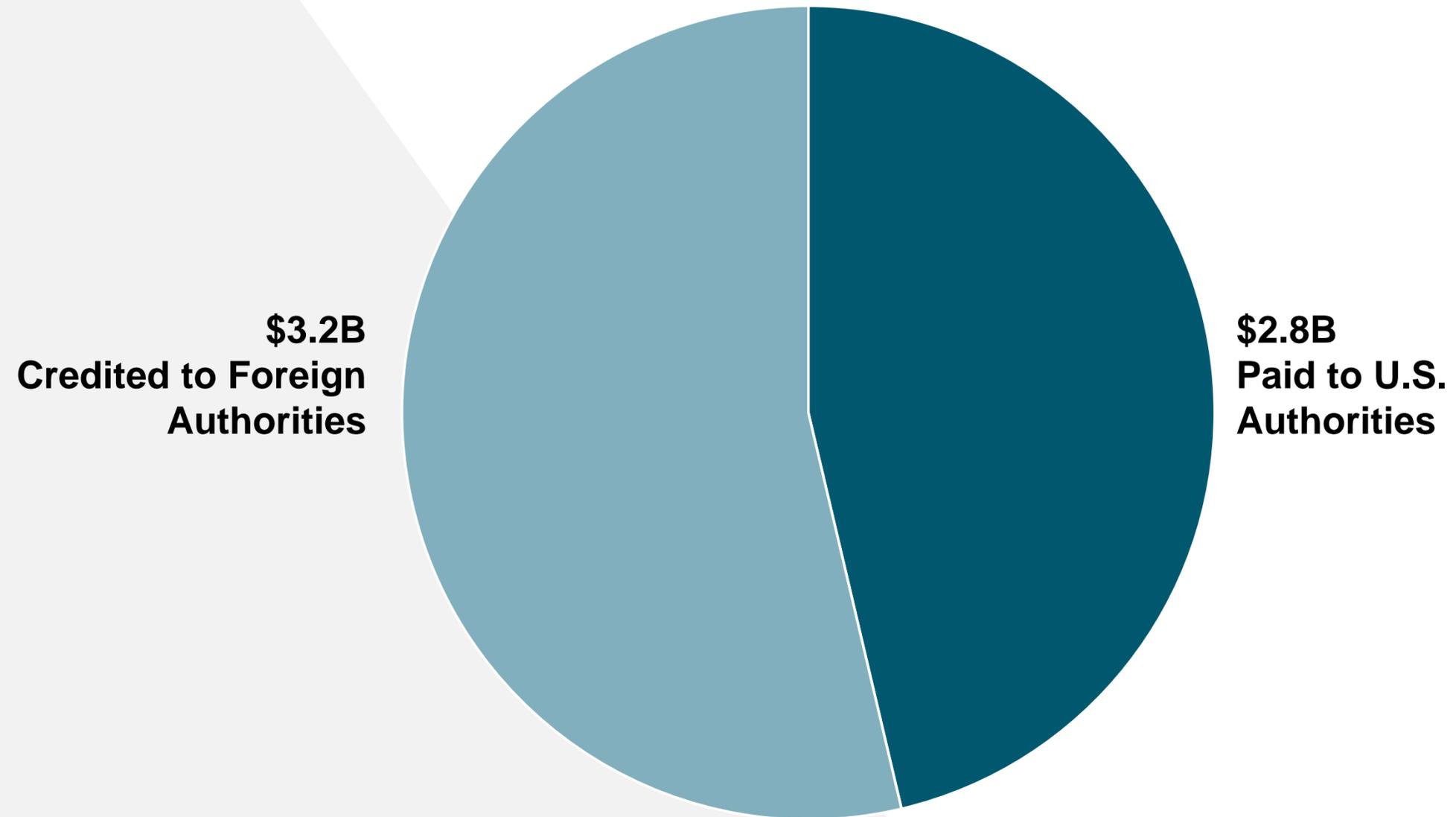
Top 5 Monetary Settlements

Total 2020 Corporate Settlements: \$6.4 Billion





Total Amounts Paid to U.S. and Foreign Authorities





Anti-Corruption Enforcement Trends

- ✓ Record-breaking monetary settlements
- ✓ Continued focus on risks related to third parties
- ✓ Reliance on FCPA's accounting provisions to reach settlements
- ✓ Continued global law enforcement cooperation
- ✓ Inaugural CFTC FCPA enforcement action - Vitol
- ✓ Ever increasing expectations of corporate compliance programs, including updated DOJ/SEC guidance
- ✓ Downtick in monitorships
- ✓ Increase in SEC whistleblower awards



Impact of the COVID-19 Pandemic

- ✓ Impact on in-person witness interviews and presentations
- ✓ Impact on sharing of foreign evidence
- ✓ Challenges of maintaining effective compliance programs, strong compliance culture, and monitoring behavior during the pandemic
- ✓ Lessened risk from gifts, entertainment, and travel
- ✓ Greater focus on potential corruption schemes related to the pandemic – e.g., healthcare, government programs



*II. Recent Government
Developments and
Policy Updates*



DOJ Updates Guidance for Evaluating Corporate Compliance Programs

- Consideration of each company's circumstances and risks
- Focus on compliance program resources and independence
- Focus on data analytics
- Need for continuous review and enhancement ("lessons learned")
- Emphasizes that effective third-party management does not stop at onboarding, but must continue through the lifespan of the relationship



Release of Second Edition of FCPA Resource Guide

- Joint guidance from the DOJ and the SEC
- Refreshes and updates the first edition (2012), including:
 - Incorporates significant policies released by the DOJ since the first edition, e.g. DOJ Corporate Enforcement Policy, DOJ's Evaluation of Corporate Compliance Programs, guidance on the selection and imposition of a compliance monitor, "No-Piling-On" policy
 - Omits discussion of the Yates Memo, in particular its requirement that for corporations to receive any cooperation credit, they must provide DOJ with "all relevant facts relating to the individuals responsible for the misconduct"
 - Supplements interpretation of key elements of the statute with recent corporate resolutions (e.g., hiring cases)



Release of Second Edition of FCPA Resource Guide

- Incorporates court decisions in cases such as *Kokesh*, *Hoskins*, *Esquenazi*
 - *Kokesh*: Limits SEC’s ability to seek disgorgement for conduct that occurred more than five years before the SEC brought action
 - *Esquenazi*: Provides a non-exhaustive list of factors for evaluating “instrumentality” – Guide updates the factors accordingly
 - *Hoskins*: Provides that foreign national is not liable under a conspiracy or aiding and abetting theory if the foreign national would not otherwise be liable, but may be liable without presence in United States if defendant is an agent of an issuer or domestic concern; emphasizes Government’s view of *Hoskins*’ potentially limited reach



DOJ Creates New Privilege Unit

- New Special Matters Unit
- Led by Jerrob Duffy (former Asst. US Attorney in Miami & DOJ Fraud Section prosecutor)
- Collaboration with FCPA, Market Integrity and Major Frauds, and Health Care Fraud Units
- Evolution of the filter team created in 2019 to oversee negotiations with defense counsel over privilege issues
- Prevent prosecutor exposure to protected information



DOJ Issues FCPA Advisory Opinion

- First opinion release since November 2014
- Question: Would fees paid by a U.S.-based investment advisor to a foreign government-linked investment bank unit trigger FCPA enforcement action?
- DOJ response: No enforcement action
 - Investment advisor received “specific, legitimate services” – compensation was reasonable for the value
 - Payments were going to the bank affiliate, not any individual
 - Payment arrangements “transparent”
 - Company received assurances from the bank unit that the payment would be used only for its business operations
- Fairly straightforward and uncontroversial principle
- Total time from submission to opinion was approximately 9 months



SEC Adopts Whistleblower Reforms

- SEC amended rules governing its whistleblower awards program
- Commissioners voted 3-2 to approve the amendments. Highlights:
 - SEC has discretion to determine the award – can change an amount simply for being too high or too low
 - Whistleblowers will only be protected if they report violations in writing to the SEC before they are retaliated against
 - Presumption of a statutory maximum award percentage at 30% for awards that are estimated to be \$5 million or less – streamlines the award evaluation process
 - Note: 75% of awards under the program have been \$5 million or less
 - Whistleblowers may receive awards based on DPAs and NPAs entered into by the DOJ or a settlement agreement by the SEC outside of a judicial or administrative proceeding



Leadership Turnover

Incoming Senior Leadership:



Merrick Garland
AG Nominee



Lisa Monaco
DAG Nominee



Gary Gensler
SEC Chair Nominee

Current FCPA Leadership:



Daniel Kahn
Acting Chief,
DOJ Fraud Section



Christopher Cestaro
Chief, FCPA Unit



Charles Cain
Chief FCPA Unit,
SEC Enforcement
Division



Vacant
Director,
SEC Enforcement
Division



*III. Key Investigation-Related
Developments*

Corporate Resolutions



Airbus SE

AIRBUS

- In January 2020, Airbus agreed to pay approximately \$2.1 billion in penalties to the DOJ for FCPA offenses, setting a record for largest FCPA penalty ever
- The total global bribery-related penalties were approximately \$4 billion, including authorities in United States, France, and United Kingdom
- Government alleged, between 2008 and 2015, Airbus used consultants to pay bribes to government officials and executives at various state-owned airlines to purchase Airbus aircraft and satellites
- Government also alleged, 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
- Government also alleged violations of International Traffic in Arms Regulations ("ITAR")
- The US nexus of the alleged conduct was lavish travel to and entertainment in the United States, but DOJ acknowledged that Airbus is not an issuer nor a domestic concern



Goldman Sachs



- In October 2020, Goldman Sachs agreed to pay approximately \$3.3 billion – the largest resolution in FCPA history – in connection with settlements to DOJ and SEC
- Due to credits against settlements with the SEC, other US regulators, and foreign authorities, Goldman Sachs ultimately paid only \$1.67 billion to the US
- Government alleged that now-former employees of Goldman Sachs in Asia orchestrated a scheme of theft and embezzlement that also included, according to the government’s papers, paying bribes through intermediaries—including Malaysian financier and fugitive, Jho Low—to senior officials in Malaysia and Abu Dhabi
- Misappropriated money was allegedly used to buy luxury apartments, yachts, paintings, and finance the movie “The Wolf of Wall Street”
- Goldman Sachs only received partial cooperation credit due to DOJ’s view that there were delays in production of evidence, including recordings of employee phone calls
- No credit received for voluntary disclosure
- Matter reflects coordination with UK, Singapore, Hong Kong, and Malaysia



Vitol Inc.



- In December 2020, Vitol agreed to pay \$135 million to the DOJ to resolve violations of the anti-bribery provisions of the FCPA
- 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.
- In a first of its kind parallel proceeding, the CFTC settled charges against Vitol for \$95 million for manipulative/deceptive conduct that involved foreign corruption
- This is CFTC's first enforcement resolution involving foreign corruption



Novartis



- In June 2020, Novartis and two subsidiaries (one current and one former) resolved FCPA investigations with the DOJ and the SEC for a combined \$347 million
- Novartis Greek subsidiary (Novartis Hellas) and former subsidiary (Alcon Pte) agreed to pay over \$233 million in FCPA criminal penalties
- Novartis Hellas was accused of bribing employees of state-owned and state-controlled hospitals and clinics in Greece and falsely recording the payments, while Alcon was accused of falsely recording improper payments in Vietnam
- Separately, Novartis settled with the SEC for over \$112 million to resolve FCPA books and records and internal controls violations spanning 2012 to 2016 at subsidiaries in South Korea, Vietnam, Greece, and China
- This FCPA resolution is the second entered into by Novartis in the last five years; Novartis previously settled with the SEC in 2016, on a neither-admit-nor-deny basis
- Because of the short span of time between the previous and this matter, DOJ did not reduce Novartis' fine by the maximum amount possible for its cooperation and remediation, resulting in a fine of \$225 million, rather than \$135 million



Sargeant Marine, Inc.



- Sargeant Marine is a Florida-based asphalt company
- In September 2020, Sargeant Marine agreed to pay \$16.6 million to resolve DOJ charges that it violated the FCPA's anti-bribery provisions
- Between 2010 and 2018, the company allegedly paid millions of dollars in bribes to foreign officials in Brazil, Venezuela, and Ecuador to obtain contracts to purchase or sell asphalt to the countries' state-owned and state-controlled oil companies
- To execute the scheme and conceal the bribe payments, Sargeant Marine entered into fake consulting agreements with bribe intermediaries in each country
- In conjunction with the resolution, the DOJ announced guilty pleas by six individuals involved in the bribery scheme and a seventh individual was also charged
- Case involves a rare guilty plea by a US parent company—likely due to Sargeant Marine being a smaller, nonpublic company, with specific improper conduct by part-owner and senior executive



Alexion Pharmaceuticals



- Alexion is a pharmaceutical company based in Boston
- In July 2020, the SEC and Alexion settled charges of books and records and internal accounting controls violations for conduct from 2010 to 2015
- 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
- In Brazil and Colombia, Alexion subsidiaries allegedly had third parties “create inaccurate financial records concerning payments to third parties, including patient advocacy organizations”
- Alexion agreed to pay approximately \$18 million in disgorgement and prejudgment interest, as well as a \$3.5 million civil penalty
- SEC considered Alexion’s cooperation, remedial acts, and steps to strengthen compliance program



Herbalife Nutrition Ltd.



- Herbalife is a US-based global nutrition company
- In August 2020, Herbalife agreed to pay about \$123 million to resolve DOJ and SEC charges that the company provided improper payments to government officials in China
- Government alleged that, 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
- Government charged Herbalife with violating the FCPA's books and records and internal controls provisions
- Herbalife agreed to pay \$55.7 million criminal penalty to the DOJ
- If the company had voluntarily disclosed, it could have been eligible for a declination or a 50% discount
- Herbalife agreed to pay approximately \$67 million to SEC (\$58.7 million disgorgement plus \$8.6 million in prejudgment interest)



Eni S.p.A.



- Eni S.p.A. is an Italian oil and gas company
- Government alleged, between 2007 and 2010, a minority subsidiary of Eni (Saipem) entered into four sham contracts to obtain government oil contracts in Algeria
- Saipem paid approximately €200 million to intermediary, which directed a portion to Algerian officials to secure state-owned oil contracts
- Saipem classified improper payments as “brokerage fees” in its books and records (which were then consolidated into Eni’s books)
- Former Saipem executive who orchestrated the scheme was later hired as Eni CFO, where he continued to facilitate Saipem’s improper payments
- SEC alleged that Eni failed to exercise “good faith” to cause Saipem to maintain sufficient internal controls
- SEC has not used “good faith” standard under 15 U.S.C. § 78m(b)(6) since 2002
- Eni agreed to pay \$24.5 million, including \$19.75 million in disgorgement and \$4.75 million in pre-judgment interest



World Acceptance Corporation



World Acceptance
Corporation

- World Acceptance Corporation (“WAC”) is consumer loan company in South Carolina
- In August 2020, WAC agreed to pay \$21.7 million to resolve SEC charges that the company bribed government and union officials in Mexico
- Government alleged, between 2010 and 2017, a subsidiary of WAC in Mexico paid over \$4 million in bribes, directly or through intermediaries, to retain business
- SEC charged WAC with violations of FCPA’s anti-bribery, books and records, and internal controls provisions
- At the same time, DOJ issued a declination letter explaining that, pursuant to its Corporate Enforcement Policy, it would not bring charges against WAC
- The DOJ cited WAC’s self-disclosure, proactive cooperation, the nature and seriousness of the offense, its comprehensive remediation, and agreement to disgorge all ill-gotten gains



Cardinal Health



- Cardinal Health is an American multinational healthcare company
- In February 2020, Cardinal agreed to pay about \$8.8 million to resolve SEC allegations of FCPA books and records and internal accounting controls violations
- The SEC alleged that, between 2010 and 2016, Cardinal China hired thousands of employees and managed marketing accounts for a large European company whose products Cardinal China distributed
- The SEC alleged that the employees made payments to government-employed HCPs and employees at other state-owned companies—without Cardinal taking steps to remediate the controls associated with the marketing account
- Cardinal agreed to pay (i) \$5.4 million in disgorgement; (ii) \$916,887 in prejudgment interest; and (iii) a civil penalty of \$2.5 million
- SEC acknowledged the company's voluntary self-disclosure, cooperation with the SEC's investigation, and remedial actions
- Cardinal announced that DOJ declined to take action



J&F Investimentos SA



- J&F Investimentos SA is a Brazil-based conglomerate involved in agriculture
- In October 2020, J&F agreed to pay \$256 million to resolve DOJ allegations of conspiracy to violate the anti-bribery provisions of the FCPA
- According to 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”
- In a related settlement, a J&F subsidiary agreed to pay the SEC disgorgement and prejudgment interest totaling about \$28.9 million
- J&F received only partial cooperation credit despite conducting an internal investigation, making presentations to 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
- However, DOJ credited up to 50% of J&F’s criminal penalty for payments made to Brazilian authorities as part of an earlier enforcement action



Beam Suntory



- Beam Suntory Inc. is a U.S. distilled beverages company
- In October 2020, Beam agreed to pay \$19 million to the DOJ to resolve FCPA violations
- DOJ accused Beam of falsely recording expenses from 2006 to 2012, which included disguising bribes to Indian government officials as commission expenses
- Beam had previously settled charges in 2018 relating to the same conduct, paying the SEC \$8.2 million. Such a large temporal gap between resolutions is unusual
- Beam did not receive full cooperation credit, nor full remediation credit
- DOJ expressed its view that Beam's cooperation was inconsistent. For example, the DOJ explained how although the company made factual presentations and made employees available for interviews, it also caused "significant delays" in reaching a resolution by its "refusal to accept responsibility for several years"
- Although although Beam implemented enhanced controls, it did not receive full remediation credit due to its failure, according to DOJ, to discipline certain individuals involved in the alleged conduct

Individual Resolutions



Martinelli Brothers

- On July 6, the DOJ unsealed charges against Luis Martinelli Linares and Ricardo Martinelli Linares, brothers and sons of Panama's former president, for alleged role in Odebrecht bribery scheme
- Government alleged that the brothers served as intermediaries for \$28 million in bribes paid by Odebrecht (Brazilian construction conglomerate) for the benefit of their father, former Panamanian president Ricardo Martinelli
- Odebrecht pleaded guilty in 2016 to making bribery payments worth hundreds of millions of dollars

Asante Berko

- On April 13, the SEC filed a civil complaint against Asante Berko, a former banker working in the UK subsidiary of a US investment bank, for alleged violations of the antibribery provisions of the FCPA
- SEC alleges that Berko orchestrated a scheme in which Ghanaian government officials received bribes in exchange for helping secure an energy contract for the bank's client, a Turkish energy company
- In announcing the complaint, SEC said "The firm's compliance personnel took appropriate steps to prevent the firm from participating in the transaction and it is not being charged."
- DOJ did not bring charges



Reza Moenaf, Eko Sulianto, and Junji Kusunoki

- On February 18, the DOJ announced charges against two former executives of an Alstom S.A. subsidiary and a former executive of Marubeni Corporation in long-running investigation into bribery in Indonesia
- The DOJ alleges that Reza Moenaf, Eko Sulianto, and Junji Kusunoki retained "consultants" to pay bribes to win a lucrative Taharan power plant contract in Indonesia
- Alstom pleaded guilty in December 2014 to bribing officials in Indonesia, Saudi Arabia, Egypt, and the Bahamas; Alstom paid \$772 million in criminal penalties to settle the charges

Larry Puckett

- On April 13, Larry Puckett, a former Alstom sales manager in the United States, was sentenced via videoconference to two years of supervised release
- Puckett agreed in 2013 to plead guilty to conspiring with Lawrence Hoskins, a former Alstom executive, to bribe Indonesian government officials in connection with the Taharan power plant



Eberhard Reichert & Andres Truppel

- On April 17, Eberhard Reichert, a former Siemens executive, was sentenced via teleconference to time served for bribing officials in Argentina
- Government alleged Reichert conspired to pay \$100 million in bribes to Argentine officials in exchange for \$1 billion contract to create national identity cards
- Reichert pleaded guilty in March 2018
- Andres Truppel, a former CFO of Siemens Argentina and Reichert's co-defendant, was sentenced in March 2020 to time served for related FCPA violations
- Truppel pleaded guilty in September 2015 to one count of conspiring to violate the FCPA's anti-bribery, internal controls, and books and records provisions, and to commit wire fraud
- Truppel was credited with cooperating with U.S. prosecutors (in part why his sentencing was delayed)
- In 2008, Siemens settled FCPA charges in the US and anti-corruption charges in Germany and elsewhere relating to, among other things, the Argentine conduct, paying approximately \$1.6 billion in total penalties



Additional PDVSA Charges

- DOJ continues its ongoing investigation into bidding panels of Venezuelan state-owned oil company Petróleos de Venezuela, S.A. (“PDVSA”)
- In February, Tulio Anibal Farias-Perez pleaded guilty to FCPA conspiracy in connection with gifts and payments to PDVSA representatives
- In March, the DOJ unsealed charges against two former PDVSA officials and filed new charges against two Venezuelan businessmen
- In November, the DOJ charged Natalino D’Amato, a dual Venezuelan-Italian citizen, with money laundering charges in connection with payments to PDVSA representatives

Donville Inniss

- On January 16, Donville Inniss, the former Barbados Minister of Industry, was convicted of one count of conspiracy to commit money laundering and two counts of money laundering
- According to the indictment, between 2015 and 2016, Inniss accepted approximately \$36,000 in bribes from executives of the Insurance Corporation of Barbados Limited (ICBL)
- In exchange, Inniss used his official position to steer approximately \$686,000 worth of renewed insurance contracts to ICBL



Seven Individuals in Sargeant Marine Scheme

- In conjunction with the September 2020 Sargeant Marine resolution, six individuals involved in the bribery scheme pled guilty
 - In December 2020, Jorge and Bruno Luz were charged and pleaded guilty to conspiring to violate the FCPA. Jorge Luz and his son Bruno allegedly facilitated the payment of bribes on behalf of Sargeant Marine
- Also in September 2020, a criminal complaint was unsealed charging a seventh individual, a former PDVSA official, for his alleged role in the Sargeant Marine scheme

Javier Aguilar

- In September 2020 Aguilar was indicted for conspiracy to violate the FCPA and to commit money laundering
- Aguilar is an oil trader at a U.S. subsidiary of Vitol
- Aguilar allegedly paid \$870,000 in bribes to Ecuadoran officials to secure a \$300 million fuel-oil contract with the state-owned enterprise, Petroecuador
- Allegedly used sham consulting agreements with intermediaries and offshore shell companies



Roger Ng

- In a motion unsealed in November 2020, Roger Ng contested charges of conspiring to launder money and conspiracy to violate the FCPA
- Ng, a former Malaysian investment banker at Goldman Sachs, was one of the first individuals charged in connection with the 1MDB bribery scheme in 2018
- Ng moved to dismiss, arguing (1) improper venue and (2) that the DOJ failed to allege that he conspired to circumvent internal accounting controls
- The Court has not ruled on Ng's motion

Claudia Diaz

- On October 30, the DOJ filed charges against Claudia Diaz and her husband for conspiracy to commit money laundering, and money laundering in connection with bribery
- Diaz is Hugo Chavez's former nurse and was elevated to National Treasurer of Venezuela in 2011
- The associated bribes were allegedly paid by Venezuelan media magnate Raul Gorrin Belisario to secure access to Venezuela's currency exchange system and obtain foreign currency at low rates

Case Closures

Significantly Fewer Case Closures in 2020

SEC		DOJ	
Company	Date	Company	Date
United Technologies Corporation	Feb. 6, 2020	Uber Technologies, Inc.	Jan. 6, 2020
USANA Health Sciences, Inc.	June 29, 2020	United Technologies Corporation	Feb. 6, 2020
KBR, Inc.	August 6, 2020	CHS, Inc.	April 8, 2020
		USANA Health Sciences, Inc.	June 29, 2020
		KBR, Inc.	August 6, 2020
		World Acceptance Corporation*	August 6, 2020

*Declined under the DOJ's Corporate Enforcement Policy



IV. Legal Developments



Liu v. SEC

- Charles Liu and Xin Wang were ordered to disgorge close to \$27 million in profits and pay \$8.2 million in penalties for allegedly misappropriating funds intended for a cancer treatment center
 - The district court had refused to permit the deduction of even legitimate business expenses from the disgorgement amount, and the Ninth Circuit affirmed
- The Supreme Court upheld the SEC's power to obtain disgorgement in civil actions, but with important limitations:
 - (1) Disgorgement amount must be returned to victims/investors for their benefit;
 - (2) Joint-and-several liability may be inconsistent with equitable principles; and
 - (3) Disgorgement award must deduct legitimate business expenses and cannot exceed the defendant's gains



United States v. Ho

- In December 2020, the Second Circuit upheld the bribery convictions of Chi Ping Patrick Ho, rejecting three of Ho's arguments on appeal:
 - For purposes of the "domestic concern" prong of the FCPA, it did not matter that the ultimate object of Ho's assistance was a foreign company, not a domestic concern
 - The money laundering statute would reach the transactions at issue, even though they were sent from Hong Kong to Uganda. The money laundering statute covers transactions that merely pass through US correspondent bank accounts
 - The court also rejected Ho's argument that a violation of § 78dd-3 could not be the specified unlawful activity underlying his money laundering convictions



United States v. Hoskins

- In February, a federal district court judge in Connecticut set aside the jury verdict and acquitted Hoskins of FCPA-related counts
 - No agency relationship found between Hoskins and Alstom's U.S. subsidiary
 - DOJ's evidence insufficient to show that the U.S. subsidiary had the ability to control Hoskins's actions
- Nonetheless, Hoskins convicted of money laundering and sentenced to 15 months in prison and a \$30,000 fine
 - CT was an appropriate venue because the money transfers were all part of a single, continuing transaction, and the U.S. subsidiary was based in CT
 - Court rejects Hoskins' argument that he had to know that his U.S. bank accounts would be used
- DOJ and Hoskins both appealed portions of the decision to the 2d Circuit



Joseph Baptiste and Roger Richard Boncy

- In June 2019, jury found retired U.S. Army colonel Joseph Baptiste and former Haitian Ambassador-at-Large Roger Richard Boncy guilty of conspiracy to violate the FCPA and Travel Act
 - Baptiste and Boncy allegedly solicited bribes from undercover FBI agents in a \$84 million port development project in Haiti
- In March 2020, a federal district judge in Massachusetts granted a new trial for both, citing ineffective counsel for Baptiste because:
 - the attorney did not subpoena any witnesses for Baptiste and pursued an entrapment defense even after being told that the defense was unavailable
 - Boncy was prejudiced because his attorney had to “play an outsized role at trial rather than pursue his preferred defense strategy”
- DOJ has appealed the order to the 1st Circuit



V. Collateral Actions



Shareholder Lawsuits

- Cognizant Technology Solutions Litigation (D.N.J. June 5, 2020)
 - A judge dismissed Cognizant's three separate motions to dismiss a shareholders' securities class action against the company and two individual defendants
- Cemex S.A.B. de C.V. Investor Lawsuit (S.D.N.Y. Feb. 2020)
 - The court dismissed the amended complaint with prejudice for failure to state a claim and determined that plaintiffs' claim was time-barred
- BRF S.A. Shareholder Litigation (S.D.N.Y. May 8, 2020)
 - \$40 million shareholder settlement to resolve a stock-drop suit alleging the company participated in a bribery scheme to conceal unsanitary practices



Shareholder Lawsuits (Cont'd)

- **Kornecki v. Airbus Shareholder Litigation (D. N.J. Aug. 6, 2020)**
 - Shareholders alleged that the company misled investors about the corruption probes
- **Glencore Investor Lawsuit (D. N.J. July 31, 2020)**
 - Investors filed a stock-drop suit against the company and in July 2020, the court granted Glencore's motion to dismiss on forum non conveniens grounds
- **Sociedad Química y Minera de Chile SA Investor Lawsuit (Nov. 2020)**
 - Chilean mining company Sociedad Química y Minera de Chile SA settled an investor-led class action lawsuit for \$62.5 million



RICO Suits

- Keppel Offshore & Marine Ltd. (S.D.N.Y. May 11, 2020)
 - The court dismissed Plaintiff's RICO conspiracy claim, but the court denied Defendant's motion to dismiss as to Plaintiffs' aiding and abetting fraud claims
- Petrobras America v. Samsung Heavy Industries (S.D. Tex. June 19, 2020)
 - Court dismissed Petrobras's complaint as time-barred
- Citgo Petroleum Corporation v. Manuel Gonzalez Testino (S.D. Tex. May 26, 2020)
 - Alleged breach of contract, fraud, and RICO violations arising from a bribery scheme
- Harvest Natural Resources (S.D. Tex. June 9, 2020)
 - The court vacated the default judgment

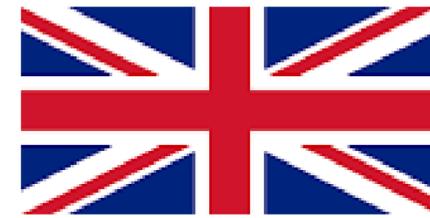


Restitution Claims

- United States v. Alarcon (PetroEcuador) (S.D. Fla. Mar. 3, 2020)
 - The court denied Ecuador’s state-owned oil company PetroEcuador’s request to receive restitution and found that PetroEcuador was not “directly and proximately harmed”
- PDVSA (Apr. 24, 2020)
 - Acting president of Venezuela 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 award of \$560 million
- United States v. OZ Africa Management (July 2020)
 - The Africo shareholders and OZ Africa reached an agreement for a \$146 million restitution deal



*VI. International
Developments*



United Kingdom

— **Legislative and Policy Developments**

- The U.K. government commissioned a review of the existing law on corporate liability for economic crime after ongoing calls for reform
- The Serious Fraud Office (SFO) has published helpful compliance and DPA excerpts from its internal handbook

— **Enforcement Efforts**

- Most significant individual trials include the Unaoil investigation (bribery offenses) and the Barclays investigation (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 relation to the 2008 financial crisis
- The SFO:
 - Closed cases at a higher rate than opening new ones, the most high-profile of which was an investigation into De La Rue Plc that commenced in 2019 but closed just 11 months later
 - Entered into DPAs with Airbus and Airline Services, both about failure to prevent bribery
 - Secured the civil recovery of \$1.6 million USD of suspected criminal assets from Julio Faerman
 - Achieved success in the first criminal trial arising out of its Unaoil probe, which concluded in summer 2020



Germany



— **Legislative and Enforcement Guidance Developments**

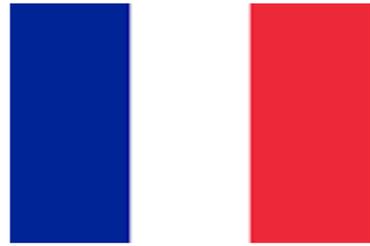
- In June 2020, the German Federal Government published a draft bill, the German Corporate Criminal Liability Act
- In September 2020, the government parties introduced a proposed Lobbying Registration Act, which intends to discourage corruption by ensuring transparency
- In mid-June, the German Federal Government announced the finalization of a new German Draft Bill Supply Chain Act that would require companies with more than 500 employees to conduct due diligence on their supply chains and implement appropriate measures to combat potential adverse effects on human rights
- Germany has until December 2021 to implement the EU Whistleblowing Directive

— **Enforcement**

- In early 2020, Frankfurt public prosecutors investigated bribery and money laundering allegations surrounding the so-called Azerbaijan affair, including former members of the German Federal Parliament
- In July 2020, a senior public prosecutor, who was responsible for prosecuting corruption cases in the healthcare sector, was arrested on suspicion of corruption



France



— **Legislative and Policy Developments**

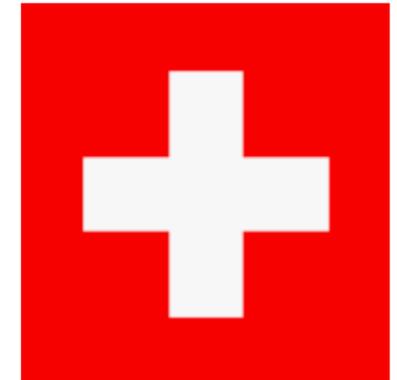
- The French Supreme Court reversed a long-standing legal principle regarding an acquiring entity's liability for the past conduct of the acquired company
- The first National Analysis asked thousands of companies to analyze their compliance with Article 17 of Sapin Law II, which requires French companies to implement internal anti-corruption measures and procedures
- As required by a recent law, in September 2020, the French financial markets regulator published Q&A guidance for service providers in digital assets, such as cryptocurrencies
- 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

— **Enforcement Efforts**

- A settlement agreement concluded between the aircraft manufacturer, Airbus, and the PNF in January 2020 involving corruption and bribery charges under the French Criminal Code



Switzerland



— **Legislative Developments**

- The Swiss Federal Council adopted the Federal Act on the Tax Treatment of Financial Sanctions, which takes effect in January 2022

— **Enforcement Efforts**

- In relation to the far-reaching and ongoing “FIFA-Gate” investigation, the Attorney General of Switzerland secured the return of \$41 million USD to the South American Football Confederation through criminal proceedings against the former president and the former secretary general of CONMEBOL
- Early 2021 Development: Conviction of Benny Steinmetz for bribes paid in Guinea



China



— **Legislative Developments**

- The new Supervision Law establishes a nationwide supervisory and sanction system
- The Standing Committee of the National People's Congress (NPCSC) has also promulgated the Law on the Administrative Disciplinary of Public Officials in June 2020
- The NPCSC adopted Amendment XI to the Criminal Law in December 2020

— **Enforcement Efforts**

- Enforcement efforts against senior government officials at the provincial, ministerial, and higher levels continued in 2020



Brazil



— **Legislative and Policy Developments**

- Brazil's new criminal law aims to continue the country's efforts to stem widespread corruption by establishing protections for whistleblowers reporting public corruption and fraud
- In January 2020, Brazil imposed a regulation requiring companies that contract with the Federal District on matters over \$979,892 USD to adopt compliance policies and procedures

— **Enforcement Efforts**

- After six years in the global spotlight, President Bolsonaro closed Brazil's Operation Car Wash investigation

— **Other Legal Developments**

- Sergio Moro, former Operation Car Wash judge, resigned from his position as Justice Minister, after accusing President Bolsonaro of trying to interfere in federal criminal investigations and exercising improper control of federal policy

— **United States Enforcement Efforts in Brazil**

- In October 2020, São Paulo-based conglomerate J&F, pleaded guilty to a charge of conspiracy to violate the FCPA for a scheme to bribe Brazilian officials



Mexico

— Enforcement Efforts

- In May 2020, Spanish law enforcement 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; Lozoya is also under investigation more broadly for his dealings with Odebrecht
- María de la Luz Mijangos Borja completed a full year of tenure as Mexico's first-ever Chief Anti-Corruption Prosecutor; despite some success, her office has faced significant staffing and resource challenges

— Other Legal Developments

- The United States, Mexico, and Canada Trade Agreement entered into force in July 2020
- 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
- The United States arrested Mexico's former Defense Minister, General Salvador Cienfuegos Zepeda, and indicted him on drug trafficking charges; however, the United States reversed course less than one month later—dropping the charges and returning Cienfuegos to Mexico for possible prosecution there
 - In January 2021, Mexican officials exonerated Cienfuegos without a trial—dashing the hopes of US authorities for continued cooperation in the matter



Other Latin America Countries and Canada

— **Other Latin America Countries**

- Observers have raised concern over the heightened risk of increased levels of corruption in the pandemic response
- Overall, Latin American efforts to combat corruption have showed signs of stalling
- The U.S. Congress passed legislation titled the “U.S. Northern Triangle Enhanced Engagement Act,” which requires that the incoming Biden administration publish a list of corrupt and undemocratic individuals from Guatemala, Honduras, and El Salvador who will be denied entry to the United States by summer 2021

— **Canada**

- Canada amended its Criminal Code in 2018 to include new processes for “remediation agreements” that will function as DPAs
- The Ontario Securities Commission approved a settlement agreement in a whistleblower case involving digital currency marketplace, the OSC’s first-ever enforcement action for retaliation against whistleblowers



Other International Developments



— **India**

- India's new independent anti-corruption ombudsperson is reported to have received 1,427 complaints after implementing a new format for lodging complaints—but disposed of over 1,200

— **Ukraine**

- Amendments to Ukraine's anti-corruption law that significantly enhance protections and incentives for whistleblowers took effect in January 2020
- In May 2020, Ukraine adopted a banking law shielding banks that had been nationalized or liquidated as part of a 2014 effort to “clean up” the financial sector from their previous owners

— **Malaysia**

- Malaysia instituted major legislative reforms on corruption and bribery through the Malaysian Anti-Corruption Commission Act 2018
- 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



International Organizations



— **World Bank**

- The World Bank Vice Group's Integrity Vice Presidency (INT) continued to vigorously investigate allegations of fraud and corruption

— **The Organisation for Economic Co-operation and Development (OECD)**

- In September 2020, the OECD Working Group on Bribery published a study on Corporate Anti-Corruption Compliance Drivers, Mechanisms, and Ideas for Change
- 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



VII. Predictions for 2021



Predictions for 2021

- Biden Administration expected to continue vigorous enforcement of FCPA
 - Large cross-border investigations with President Biden’s pledge to host a “Summit for Democracy” with the world’s democracies, for which “fighting corruption” is one of the top three priorities
- Impacts of COVID-19 will be felt for at least some if not most of 2021
- Changes to business behavior resulting from the pandemic may give rise to potential compliance risks
- Continued efforts by the DOJ and SEC to push the boundaries of agency theory



VIII. Compliance Takeaways



Compliance Takeaways

- Focus on using data analytics to improve compliance programs
 - Recent DPAs and plea agreements with Herbalife, Sargeant Marine, and JP Morgan Chase & Co (in a non-FCPA case) each contain language providing that the company will integrate data analysis into its compliance program
- Allocate resources to ensure that compliance programs tailored to risks
- Monitor risks presented by third parties and note that risk-based diligence at the onboarding stage on its own may not sufficiently demonstrate effective third-party management
- Consider that compliance program may be subject to many non-US laws and regulations
- Ensure that compliance programs respond to changes in the company, its business or industry, and its geographic footprint



Questions

Lori Echavarria

Partner

WilmerHale

lori.echavarria@wilmerhale.com

Jay Holtmeier

Partner

WilmerHale

jay.holtmeier@wilmerhale.com

Kimberly Parker

Partner

WilmerHale

kimberly.parker@wilmerhale.com

Erin Sloane

Partner

WilmerHale

erin.sloane@wilmerhale.com

John Walsh

Partner

WilmerHale

john.walsh@wilmerhale.com