

2020 Year in Review: Anti-Corruption Trends and Other Corporate Enforcement Issues

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January 28, 2021



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Presented by



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COVID-19 Impact



As COVID-19 has impacted economic activity around the world, it has also increased FCPA risks and made compliance oversight more challenging.

Economic Hardship

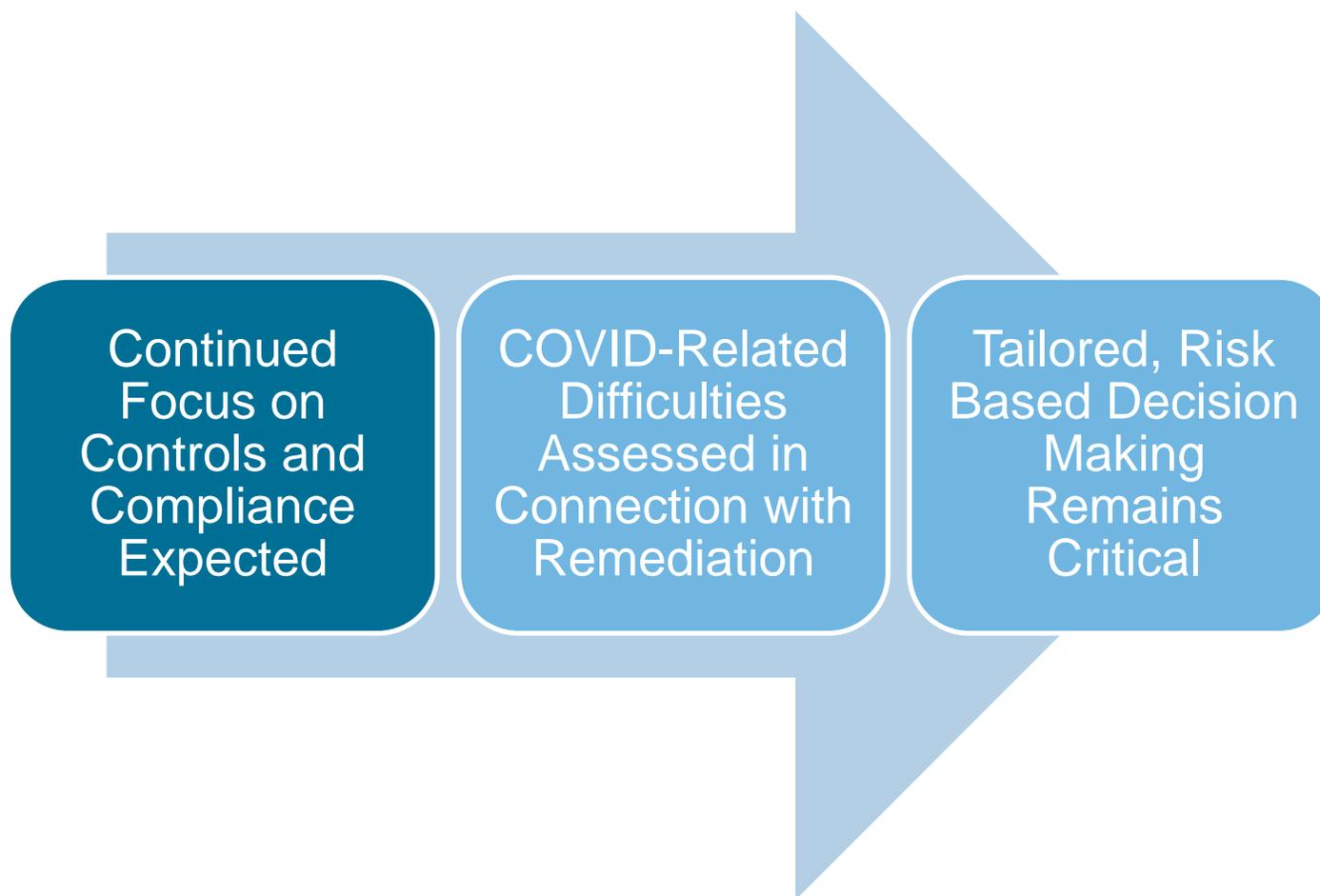
- Financial pressures can create stronger incentives for corruption
- Increased reliance on personal devices and ephemeral messaging platforms can increase the difficulty of compliance and data collection and retention

Virtual Business Environment

- Compliance personnel, investigators, and auditors may be unable to travel to conduct onsite interviews, document collection and other due diligence work
- As companies face financial strain, compliance programs may face budget cuts

COVID-19 Impact

ENFORCEMENT DURING COVID-19



COVID-19 Impact

ENFORCEMENT DURING COVID-19 (CONT.)



- **Enforcement Continues**

- DOJ has been able to enforce the FCPA despite the pandemic, as shown by this year's historic numbers, *per Brian Rabbitt, Acting Assistant Attorney General for the Criminal Division on Dec. 3, 2020*

- **Virtual Workarounds**

- DOJ and the SEC have continued working remotely, including evidence gathering, witness interviews, and depositions

- **International Cooperation**

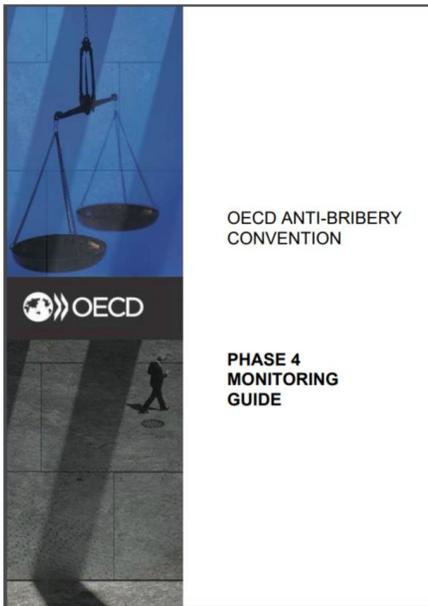
- Despite impediments to travel, international cooperation is as strong as ever. U.S. authorities are coordinating resolutions on at least weekly calls with authorities around the globe, *per Daniel Fuhr, Assistant Chief of the FCPA Unit of the Fraud Section for the Criminal Division on Dec. 3, 2020*

- **Case Backlog**

- Still, delays and deferments as to impaneling grand juries, trials, and other proceedings were inevitable, and there is a significant backlog of cases involving individuals, which is likely to continue into next year

International Impact

OECD



- The OECD issued its Phase 4 report of U.S. Anti-Bribery measures on November 17, 2020
- Praiseworthy Efforts
 - Strong incentives for voluntary self-disclosure
 - Robust detection networks in public and private sectors
 - High volume of cases resolved by DOJ and SEC
- Suggested Reforms
 - SEC should consolidate and publish its policy guidelines on FCPA enforcement to enhance transparency
 - Enhance protections for whistleblowers

2020 Enforcement Snapshot

Notable Corporate Enforcement Actions

1		\$2.1B to DOJ	7		\$123.1M to SEC and DOJ
2		\$8.8M to SEC	8		\$16.6M to DOJ
3		\$24.5M to SEC	9		\$284.5M to SEC and DOJ
4		\$346.7M to SEC and DOJ	10		\$19.6M to DOJ
5		\$21.4M to SEC	11		\$3.9B to DOJ and SEC
6		\$21.7M to SEC	12		\$163M to DOJ and CFTC

*Data reflects U.S. resolutions (not reflecting offsetting payments to foreign authorities)

2020 Enforcement Snapshot

OVERVIEW OF INDIVIDUAL ENFORCEMENT ACTIONS

- In 2020, the DOJ and SEC brought 32 FCPA and FCPA-related individual enforcement actions
- DOJ charged 29 individuals in connection with FPCA matters and SEC charged three individuals
- By way of comparison, last year, the DOJ brought FCPA-related charges against 34 individuals, more than any other year



“Ensuring individual accountability for corporate wrongdoing has been a hallmark of our white-collar work in recent years, and 2020 was no exception. This past year saw the Fraud Section publicly charge almost 300 individuals, including over 20 individuals charged in connection with corporate matters resolved during the year.”

– *Remarks of Acting Assistant Attorney General Brian C. Rabbitt at the ACI 37th Annual Conference on the FCPA*

*Data reflects U.S. resolutions

2020 Enforcement

TRENDS AND TAKEAWAYS



- **Resolutions underscore continued commitment to enforcement by DOJ and SEC**
- **Repeat industry and geographic focus**
 - Continued activity in the same core group of sectors that have historically been an area of FCPA enforcement
 - Geographic focus also continues to be on repeat players in the FCPA space, including China and LatAm
- **Lessons learned from Brazil**
 - Brazilian leniency agreements
 - Increasingly strong cooperation between American and Brazilian law enforcement
 - The importance of seeking concurrent resolutions

2020 Enforcement

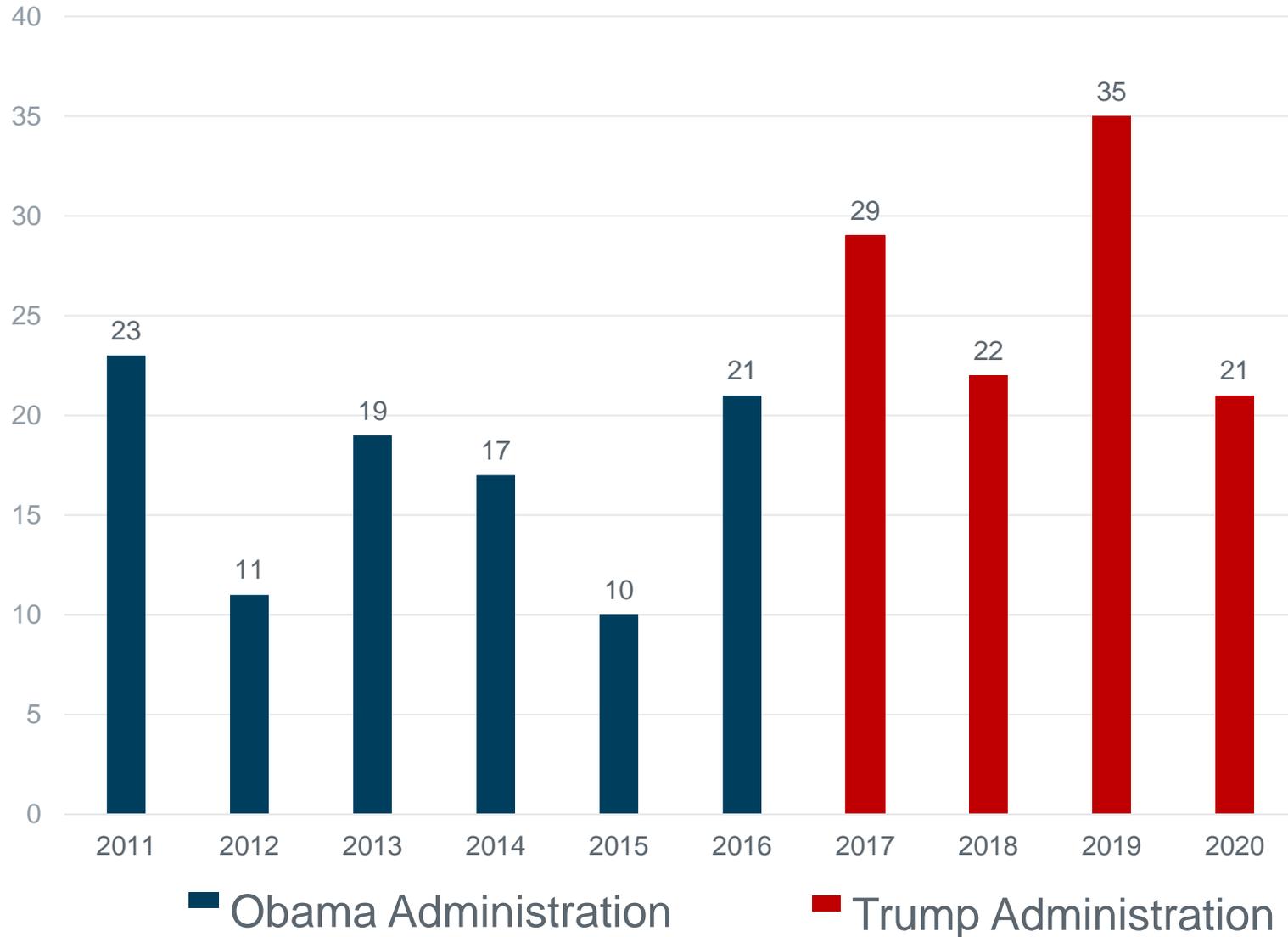
TRENDS AND TAKEAWAYS (CONT.)



- **Fulsome cooperation and proactive remediation are critical**
 - Multiple instances of partial credit this year
 - Companies should cooperate and seek to resolve with DOJ and SEC concurrently
 - DOJ and SEC are not always in lockstep
- **Empowering internal controls and compliance was in focus**
 - DOJ was critical where it felt internal controls and compliance were ignored
 - The business side should be engaged on internal controls and compliance
- **Schemes involving third parties remained prevalent**
 - Included payments under the guise of fake or inflated contracts, invoices, services, and others
- **More corrupt gifts, hospitality, and entertainment**
 - Included travel to vacation destinations, meals and alcohol, luxury goods, and leisure activities

FCPA Enforcement

NUMBER OF DOJ ENFORCEMENT ACTIONS INITIATED



FCPA Enforcement in the Biden Administration

EXPECTATIONS

- Steady rate of FCPA prosecutions
- Increased corporate enforcement
- A focus on:
 - Pandemic-related fraud, such as PPP loans
 - Holding individuals accountable
 - International cooperation

The Washington Post

Trump called global anti-bribery law ‘horrible.’
His administration is pursuing fewer new investigations.



By Renae Merle
Jan. 31, 2020 at 2:27 p.m. EST

FOREIGN AFFAIRS

Why America Must Lead Again

Rescuing U.S. Foreign Policy After Trump



By Joseph R. Biden, Jr.
March/April 2020

Statutory Updates

NATIONAL DEFENSE AUTHORIZATION ACT – IN DEPTH



- On December 28, 2020, Congress overrode the President’s Veto of the [2021 National Defense Authorization Act](#).
- Among other things, the new law expands the SEC’s disgorgement authority. Specifically, Section 6501 does the following:
 - **Extends** the statute of limitations for SEC disgorgement claims to 10 years, but only for scienter-based claims. For all other claims, the statute of limitations remains five years
 - **Tolls** the statute of limitations for any disgorgement claim while “the person against which the action or claim” is brought is outside of the United States
 - **Codifies** the Supreme Court’s holding in *Liu* that the SEC has authority to seek disgorgement in federal district court actions

Global Developments: China

RECENT DEVELOPMENTS



PRC legislative developments in 2020, building on other recent activity, have significant potential consequences for FCPA investigations

- **New Procedural Aspects to Onshore Blocking**

- Article 177 of the PRC [Securities Law](#) (2020) now blocks provision of materials to non-Chinese regulators in securities law investigations, parallel to the PRC [International Criminal Judicial Assistance Law](#) (2018)
- 2020 saw the SEC and counterpart CSRC work within the legislative framework to explore cooperation mechanisms and participate in investigations

- **New Substantive Blocks – Data Security and Data Privacy Laws**

- A draft [Data Security Law](#) (published for comment July 2020) proposes to restrict data relating to “national security” and “critical data” (terms undefined in the draft)
- A draft [Personal Information Protection Law](#) (published for comment October 2020) proposes that onshore regulators evaluate the cross-border provision of personal data (above a certain quantitative threshold) – with potentially very significant monetary penalties in play

Global Developments: China

RECENT DEVELOPMENTS (CONT.)



Significant recent activity in **Chinese countermeasures to US sanctions and export control** programs adds potential contact (and friction) points for businesses active in China

- **Limiting the Effect of Non-Chinese Sanctions**

- Chinese Ministry of Commerce (MOFCOM) **Order No. 1 of 2021** seeks to counter extraterritorial effects of US sanctions programs, requiring Chinese entities to report non-Chinese sanction restrictions to MOFCOM for evaluation and possible “prohibition” – blocking their effect
- **Order No. 1** also grants Chinese persons the right to sue for damages arising out of the application of a foreign sanctions law within the scope of a prohibition order

- **Homegrown Measures**

- MOFCOM detailed mechanisms for “unreliable entities” in September 2020
- Adopted **Export Control Law** (October 2020), restricting exports for reasons of national security and public policy
- Announced “sanctions” and travel restrictions against US government officials and related organizations

United Kingdom

RECENT DEVELOPMENTS AND TRENDS

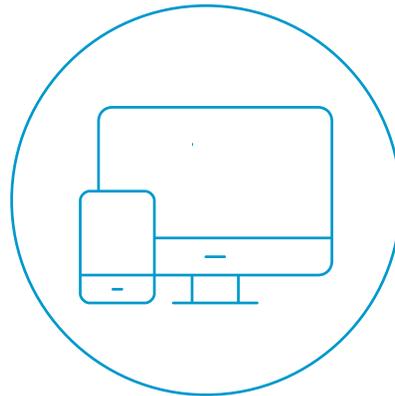


- On October 23, 2020, the **UK Serious Fraud Office** (“SFO”) published internal guidance on Deferred Prosecution Agreements
 - Guidance emphasizes that cooperation is a “key factor to consider when deciding whether to enter into a DPA.”
 - The SFO will give considerable weight to a “genuinely proactive approach adopted by a company when wrongdoing is brought to their attention.”
 - Companies are also urged to self-report wrongdoing “within a reasonable time of the offending conduct coming to light” to proceed to DPA negotiation
 - Cooperation and self-reporting do not guarantee that a DPA will be offered
 - The guidance lists relevant considerations for a DPA in the event of parallel investigations with other authorities, including:
 - Early communication
 - Consistency by the company on admissions made in respective jurisdictions
 - Coordination of market announcements for public companies in different jurisdictions
 - Coordination of court listing dates to ensure simultaneous resolutions, where possible

Thank you!

For more information, please visit our FCPA webpage:

<https://www.davispolk.com/practices/litigation/anticorruption-and-fcpa/>



Appendix



Presenters



Greg D. Andres

Greg is in Davis Polk's Litigation Department, concentrating in white collar criminal defense and representing clients in both civil and criminal trials. He has represented individuals, financial institutions and other entities in a wide range of regulatory and criminal investigations involving market manipulation, insider trading, securities, procurement and tax fraud, and money laundering. He also has extensive experience in anti-corruption matters, both in private practice and at the Department of Justice. Greg rejoined Davis Polk in 2019 after nearly two years as a member of Special Counsel Robert Mueller's team investigating Russian government efforts to influence the 2016 presidential election and related matters. Greg served as the lead trial lawyer in the successful prosecution of Paul Manafort in the U.S. District Court for the Eastern District of Virginia.



Martine M. Beamon

Martine is in Davis Polk's Litigation Department, concentrating in white collar criminal defense. She is a former federal prosecutor in the U.S. Attorney's Office for the Southern District of New York and her matters have included grand jury, regulatory and independent investigations, representing companies, board of directors and individuals in connection with allegations of foreign corrupt practices, anti-money laundering, securities fraud, criminal tax violations, pharmaceutical marketing violations and workplace misconduct, among other areas. Ms. Beamon also has participated in a number of confidential internal investigations and has advised corporations and boards of directors on matters of corporate governance and compliance.



Angela T. Burgess

Angela is in Davis Polk's Litigation Department and is co-chair of the firm's Global Enforcement and Investigations Group. She has represented leading clients in some of the most high-profile and complex white collar and regulatory matters in recent years. She is based in New York and her global practice focuses on representing companies as well as individuals in matters involving allegations of insider trading, violations of anti-bribery laws, money laundering, antitrust, fraud, and other financial crimes. Angela also routinely advises boards of directors, audit committees, and companies on corporate governance and compliance matters, including the design of strategies, policies and procedures to mitigate risk.

Presenters (cont.)



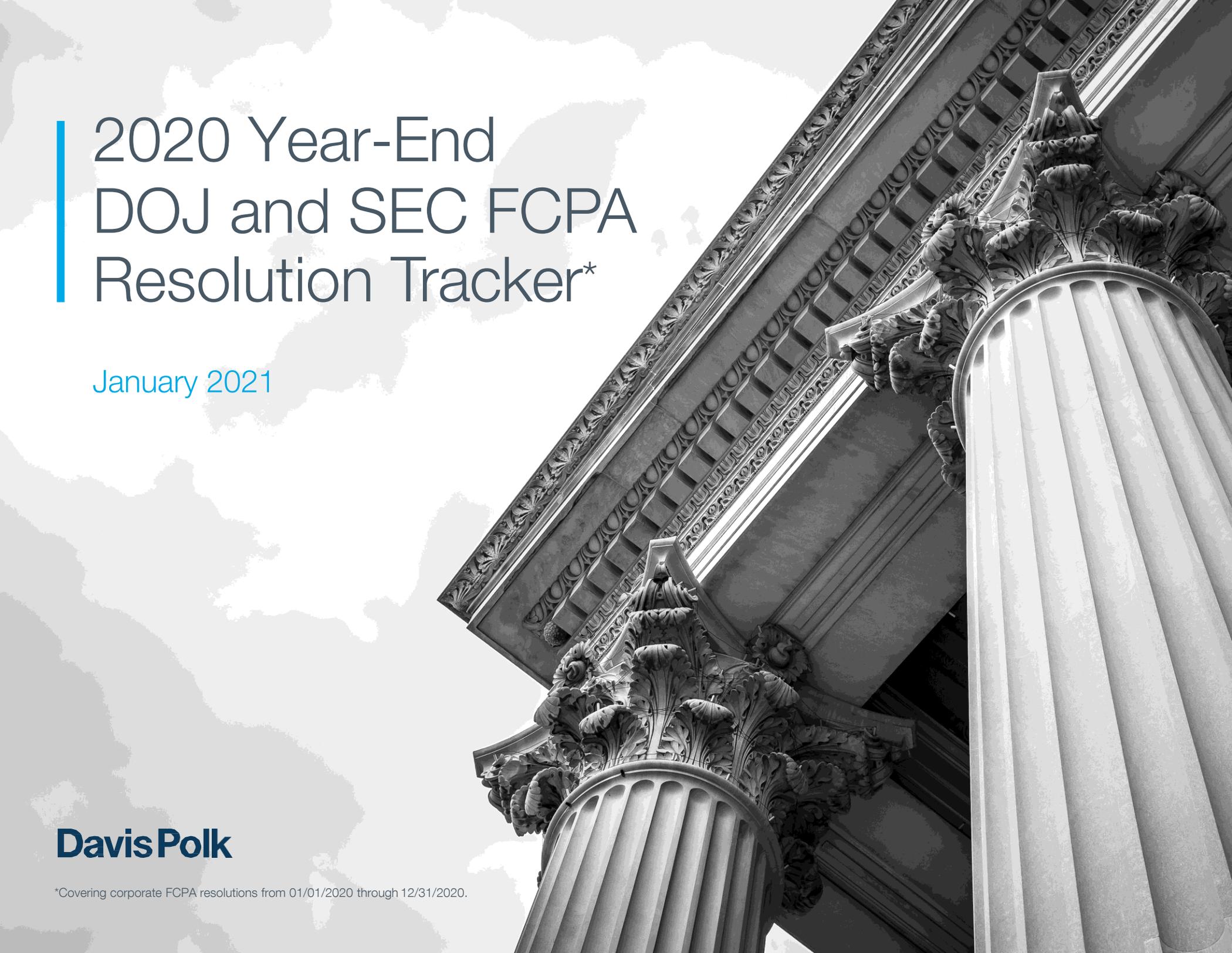
Fiona R. Moran

Fiona is a partner in Davis Polk's Litigation Department and White Collar Defense & Investigations Group, practicing in the Washington DC office. Her practice focuses on government investigations and enforcement actions, as well as congressional inquiries. She also represents clients in connection with confidential internal investigations and advises companies on corporate governance and compliance matters, including the design of strategies, policies and procedures to mitigate risk. Her matters have involved allegations of fraud, violations of anti-bribery laws, insider trading, money laundering, antitrust and other financial crimes, and her clients have included major financial institutions, regulated entities, public companies, senior executives and former government officials.



Patrick S. Sinclair

Patrick is in Davis Polk's Litigation Department and is a member of the firm's Global Enforcement and Investigations Group. Patrick has more than a decade of experience representing U.S.-based and international corporations, audit committees, banks, individuals, and the government in corporate criminal investigations. He is based in Hong Kong and regularly leads internal investigations for multinational corporations in Asia, and has represented a number of individuals in Asia who were the subject of inquiries from U.S. Attorneys' Offices, the SEC, CFTC, and other U.S. regulators. From 2007 to 2014, Patrick was a prosecutor in the U.S. Attorney's Office for the Eastern District of New York. He was appointed Deputy Chief of the General Crimes Section in 2013.



2020 Year-End DOJ and SEC FCPA Resolution Tracker*

January 2021

Davis Polk

*Covering corporate FCPA resolutions from 01/01/2020 through 12/31/2020.

2020 Year-End DOJ and SEC FCPA Resolution Tracker

	Target	Enforcer	Resolution*	Alleged FCPA Violation	Industry	Geography	Allegations
01/28/2020	Airbus SE	DOJ	\$2.09B (DPA)		Aerospace	China	Paid bribes to government officials through third-party consultants to boost the size of aircraft orders and to obtain a more favorable regulatory environment.
02/28/2020	Cardinal Health, Inc.	SEC	\$8.8M (cease & desist order)	 	Healthcare	China	Regional subsidiary used marketing accounts to pay bribes. Despite apparent red flags, both the parent and subsidiary failed to investigate or detect the misconduct for several years.
04/17/2020	Eni S.p.A.	SEC	\$24.5M (cease & desist order)	 	Oil & Gas	Algeria	Subsidiary entered into sham contracts with intermediary to assist in obtaining contracts from state-owned oil company. The intermediary directed a portion of that money to government officials.
06/25/2020	Novartis AG	DOJ & SEC	DOJ: \$233.9M (DPA) SEC: \$112.8M (cease & desist order)	  	Healthcare	China, Greece, South Korea, Vietnam	Local subsidiaries and affiliates engaged in a variety of schemes to make corrupt payments to public and private healthcare providers.
07/02/2020	Alexion Pharmaceuticals, Inc.	SEC	\$21.4M (cease & desist order)	 	Healthcare	Turkey, Russia, Brazil, Colombia	Subsidiaries made corrupt payments to secure favorable regulatory treatment for Alexion's primary drug. Inadequate controls resulted in subsidiaries' failure to maintain accurate books and records regarding third-party payments.

*Resolution figures do not reflect amounts credited to other state and federal agencies or international regulators.

2020 Year-End DOJ and SEC FCPA Resolution Tracker

Target	Enforcer	Resolution*	Alleged FCPA Violation	Industry	Geography	Allegations
08/06/2020 World Acceptance Corporation	SEC	\$21.7 million (cease & desist order)	  	Finance	Mexico	Bribed government and union officials to secure the ability to make loans to government employees. Inaccurately recorded these bribes as legitimate expenses and lacked sufficient internal controls.
08/28/2020 Herbalife Nutrition Ltd.	DOJ & SEC	DOJ: \$55 million (DPA) SEC: \$67 million (cease & desist order)	  	Healthcare	China	Conspired to bribe Chinese officials to increase business, obtain licenses, influence certain governmental investigations, and influence certain Chinese state-owned and state-controlled media. Conspired to falsify books and records.
09/22/2020 Sargeant Marine Inc.	DOJ	\$16.6 million (guilty plea)		Oil & Gas	Brazil, Venezuela, Ecuador	Conspired to bribe officials at state-owned enterprises to obtain business. Concealed corrupt payments using fake contacts and invoices.
10/14/2020 J&F Investimentos S.A./JBS S.A.	DOJ & SEC	DOJ: \$256 million (plea bargain) SEC: \$28 million (cease & desist order)	  	Meat/Agriculture	Brazil	Made bribe payments to Brazil's former Finance Minister and, at his direction, to other Brazilian government officials, political parties, and candidates, in order to facilitate mergers and acquisitions.
10/21/2020 The Goldman Sachs Group Inc.	DOJ & SEC	DOJ: \$2.9 billion (DPA) SEC: \$1 billion (cease & desist order)	  	Finance	Malaysia, United Arab Emirates	Conspired to make payments to secure business in connection with 1MDB

*Resolution figures do not reflect amounts credited to other state and federal agencies or international regulators.

2020 End-Year DOJ and SEC FCPA Resolution Tracker

	Target	Enforcer	Resolution*	Alleged FCPA Violation	Industry	Geography	Allegations
10/21/2020	Beam Suntory Inc.	DOJ & SEC	DOJ: \$20 million (DPA) SEC: (cease & desist order)	  	Distilled Beverages	India	Paid \$18K bribe through subsidiary to Indian official to secure license to bottle a line of products.
12/03/2020	Vitol Inc.	DOJ	\$135 million (DPA) \$29 million (to the CFTC in a related matter)		Oil & Gas	Brazil, Ecuador, Mexico	Conspired to make bribe payments to officials at state-owned enterprises to win fuel oil contracts and retain business in connection with oil products.

*Resolution figures do not reflect amounts credited to other state and federal agencies or international regulators.