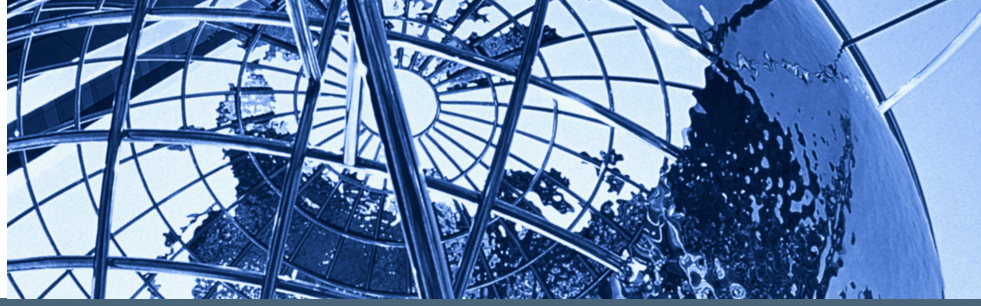
Anti-Corruption

QUARTERLY



Q3 2020

IN THIS ISSUE

SIDLEY

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NEWS

DOJ ISSUES FIRST FCPA OPINION PROCEDURE RELEASE IN YEARS

The U.S. Department of Justice (DOJ) issued an FCPA Opinion Procedure Release for the first time since November 2014, advising a U.S.-based investment adviser (the Requestor) that fees paid to a foreign government-linked investment bank's affiliate would not trigger a Foreign Corrupt Practices Act (FCPA) enforcement action. While the opinion did not contain any novel guidance, the opinion is a reminder of the availability of this process as an option for companies to consider in appropriate circumstances when evaluating and mitigating their FCPA risk exposure. Companies should also review this and any future opinions as they continue to evaluate their FCPA compliance programs.

The FCPA Opinion Procedure Process

The FCPA opinion procedure process enables issuers and domestic concerns to obtain an opinion from DOJ regarding whether certain prospective—not hypothetical—conduct conforms with DOJ's FCPA enforcement policy. Each request for an opinion must be accompanied by all relevant information and documents and signed by a senior corporate officer (and, at times, the chief executive officer) with operational responsibility for the conduct that is the subject of the request, certifying that it is a correct and complete disclosure. DOJ may request additional information and/or documents within 30 days of receiving the request and will issue an opinion within 30 days of receiving all relevant materials.

The Recent Opinion

In the request for the recent opinion, the Requestor informed DOJ that it intended to pay $237,500 to a foreign investment bank as compensation for services that helped the Requestor acquire a portfolio of assets. The Requestor did not have a signed agreement with the bank, but a draft agreement provided for this percentage-based advisory fee. The Requestor also told DOJ that a government entity indirectly owns a majority of the shares of the bank.

DOJ's opinion concluded that there would not be a violation of the FCPA under these facts where the payment would be made to an entity (i.e., the bank) and not forwarded to any government official. The opinion noted that there was no indicia that the Requestor's payment to the bank was intended to corruptly influence a foreign official, as the payment arrangements were transparent, the Requestor had received assurances from the bank's chief compliance officer that the payment would be used only for the

bank's business operations and would not be forwarded to any other entity, and the Requestor received specific, legitimate services from the bank.

Companies should use the recent opinion as a reminder that the opinion process is available to them in appropriate circumstances, albeit not without limitations.

Companies should use the recent opinion as a reminder that the opinion process is available to them in appropriate circumstances, albeit not without limitations. For example, the Requestor in the recent opinion initially submitted its request in November 2019 and provided supplemental information in January, February, June, and July 2020 for a cumulative process that took nine months to obtain an opinion, a time period that may deter companies from using this process. Additionally, this opinion (and any others under the program) has no precedential value to any party that did not make the request. Nonetheless, at minimum, companies should look to this opinion and others when evaluating and mitigating their FCPA risk.

SEC ADOPTS AMENDMENTS TO WHISTLEBLOWER PROGRAM

On September 23, 2020, the U.S. Securities and Exchange Commission (SEC) voted 3-2 to adopt amendments to its whistleblower award program. The SEC touted the amendments as providing enhanced clarity to whistleblowers, improving the program's efficiency and transparency, and likely increasing the award dollar amount in a significant percentage of whistleblower actions. With improvements to the program making participation increasingly attractive to potential whistleblowers, including whistleblowers' raising anticorruption allegations that may result in liability under the FCPA, companies should ensure that their compliance programs keep pace to foster a culture of internal reporting in an environment where retaliation against whistleblowers is clearly not tolerated.

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The SEC whistleblower award program, established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), has proved to be an enforcement juggernaut, leading to more than $2.5 billion in financial remedies, with over $500 million awarded to almost 100 whistleblowers. The program has continued to grow under current SEC Chairman Jay Clayton, who assumed his position in 2017 and has since overseen the five largest awards in the program's history. The recent amendments to the program are expected to further bolster the SEC's ability to process claims promptly and make awards to qualifying tipsters, including in FCPA enforcement actions. We summarize key changes to the program below.

Adjustments to Whistleblower Awards

Significantly, the amendments will not include a controversial proposed amendment that would allow the SEC to apply a reduction to awards over $100 million. The SEC's adopting release formally announcing the amendments reiterates the SEC's view that it exercises discretion in applying the award factors and setting the award amount, including the ability to apply the award factors in percentage terms, dollar terms, or some combination thereof.

Noting that approximately three-fourths of the whistleblower awards have totaled less than $5 million, the amendments streamline the determination process for awards by presuming the statutory maximum will be awarded where no negative award criteria are present. Awards over $5 million will still be subject to SEC analysis, with amounts determined based on the application of a number of factors, including the degree of assistance provided by the whistleblower, the SEC's interest in deterring the specific violation, and the significance of the information provided by the whistleblower.

Uniform Definition of "Whistleblower" in the Wake of *Digital Realty Trust, Inc., v. Somers*

The U.S. Supreme Court held in *Digital Realty Trust, Inc., v. Somers* (2018), that whistleblower protections extend only to individuals who report alleged violations of securities laws to the SEC. The adopting release reflects that individuals who report such allegations only

internally are not whistleblowers based on the plain meaning of Dodd-Frank's statutory text and therefore do not qualify for the statute's whistleblower protections. Notably, the SEC added a requirement that a whistleblower must submit a claim in writing to the SEC to receive statutory protections, which is likely to further drive whistleblowers directly to the SEC. Despite suggestions from some commenters, the final rules include a reaffirmation that cooperation with internal compliance remains a "plus" factor for increasing award size, even in light of *Digital Realty*. Additionally, regardless of *Digital Realty*, employers should still be mindful that other anti-retaliation statutes, including Sarbanes-Oxley, may protect those who make internal reports.

Whistleblower Award Eligibility

Related Actions by Other Regulators: The amendments clarify the SEC's approach in actions by other regulators that are related to an SEC action. To qualify for an award for an action by another regulator, that regulator must receive relevant information from the whistleblower. In effect, the amendments encourage whistleblowers to provide information directly to the SEC as well as other potentially relevant agencies, including DOJ.

The amendments allow deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs) entered into by DOJ in a criminal proceeding to trigger eligibility for a whistleblower award. This likely will have the biggest impact in FCPA actions, where such resolutions are common.

NPAs and DPAs: The amendments allow deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs) entered into by DOJ in a criminal proceeding to trigger eligibility for a whistleblower award. This likely will have the biggest impact in FCPA actions, where such resolutions are common. This, combined with the new requirement that whistleblowers or the SEC must specifically communicate the relevant information to DOJ, may push more whistleblowers to default by reporting anti-corruption concerns to both the SEC and DOJ.

"Independent Analysis" Used in Award Applications: A whistleblower must provide "independent analysis" to qualify for an award under the program. The SEC is issuing interpretive guidance explaining that a whistleblower must provide evaluation, assessment, or insight beyond what would be reasonably apparent to the SEC from publicly available information.

Dissenting Votes

The two dissenting Commissioners expressed concern that the amendments would create uncertainty for potential whistleblowers that could chill reporting. Of particular concern were the SEC's discretion to change the award size (and whether this potentially exceeded the SEC's statutory authority) and the guidance regarding what constitutes the "independent analysis" a whistleblower must provide.

...it is important that companies continually review and improve their compliance programs and consider their compliance cultures to ensure that potential whistleblowers are comfortable and encouraged to make complaints internally without fear of retaliation.

The narrow 3-2 margin adopting the amendments reflects the challenges SEC Chairman Clayton faced in building consensus around the proposed amendments. The split vote came after an unusually long review period and two prior planned votes, both cancelled shortly before they were scheduled to occur. The statements of the dissenting Commissioners similarly suggested that there were protracted efforts to achieve unanimous approval, which were ultimately unsuccessful. The dissenting Commissioners also made clear, however, that they supported many of the new rules' improvements to the program.

Takeaways

The SEC's whistleblower award program continues to be an enormous success for the SEC, as all five Commissioners emphasized when voting on the new amendments. As the SEC looks for additional ways to improve its operation, it is important that companies continually review and improve their compliance programs and consider their compliance cultures to ensure that potential whistleblowers are comfortable and encouraged to make complaints internally without fear of retaliation.

IN THE INTERIM

7/2/2020: Alexion Pharmaceuticals, Inc., a Boston-based pharmaceutical company, has agreed to pay more than $21 million to the SEC to resolve charges that it violated the books and records and internal accounting controls provisions of the FCPA. According to the SEC order, two Alexion subsidiaries made payments to foreign government officials to secure favorable treatment for Alexion's primary drug, Soliris. The order found that from 2010 to 2015, Alexion Turkey paid Turkish government officials to improperly influence them to approve patient prescriptions and provide other favorable regulatory treatment for Soliris. The order also found that from 2011 to 2015, Alexion Russia made improper payments to Russian government healthcare officials to favorably influence the regulatory treatment of and budget allocated to Soliris as well as to increase the number of approved Soliris prescriptions. Alexion Russia and Alexion Turkey maintained false books and records of these improper payments, which Alexion's internal accounting controls were not sufficient to detect or prevent. Further, the order found that Alexion's subsidiaries in Brazil and Colombia failed to maintain accurate books and records, including by creating or directing third parties to create inaccurate financial records concerning payments to patient advocacy organizations.

https://www.sec.gov/litigation/admin/2020/34-89214.pdf

7/6/2020: The DOJ charged Luis Enrique Martinelli Linares and Ricardo Alberto Martinelli Linares, two sons of former Panamanian President Ricardo Martinelli, for their roles in a massive bribery and money-laundering scheme involving Odebrecht S.A. (Odebrecht), a Brazil-based global construction conglomerate. As alleged in the complaint, between approximately August 2009 and January 2014, the defendants facilitated the payment of bribes from Odebrecht to or for the benefit of a then-high-ranking government official in Panama by taking a number of steps that included opening and managing secret bank accounts held in the names of shell companies in foreign jurisdictions. These secret bank accounts were used to receive, transfer, and deliver the bribe payments. The defendants served as the signatories on certain of the shell company bank accounts and personally sent wire transfers through the structure of shell company bank accounts to conceal and spend bribery proceeds. Many of these financial transactions were in U.S. dollars and were made through U.S. banks.

https://www.justice.gov/opa/press-release/file/1292366/

7/13/2020: Prosecutors urged the U.S. Court of Appeals for the Second Circuit to reinstate a jury's guilty finding that former Alstom SA executive Lawrence Hoskins qualified as an agent of Connecticut-based Alstom Power Inc. (API) under U.S. law. The Second Circuit ruled earlier in the case that Hoskins could be found guilty under the FCPA only if prosecutors could prove that he acted as an agent of API. A jury convicted Hoskins on that basis, but a district court judge overturned the conviction in February after Hoskins argued that he did not work for API and that API would have had to approach someone in Hoskins' own corporate chain of command in order to control his conduct. In overturning the conviction, the district court judge stated that there was "no evidence upon which a rational jury could conclude that Mr. Hoskins agreed or understood that API would control his actions." On appeal, the prosecutors argued that there was "sufficient evidence for the jury to conclude that API controlled Hoskins's undertaking on its behalf."

7/15/2020: The UK's Serious Fraud Office convicted two former oil executives who conspired to give corrupt payments to secure contracts in Iraq. A jury at Southwark Crown Court in London found Ziad Akle guilty on two counts and Stephen Whiteley guilty on one count of conspiracy to give corrupt payments. The convictions follow the guilty plea of co-conspirator Basil Al Jarah, who admitted to five counts of conspiracy to give corrupt payments in July

2019. In the years of reconstruction in Iraq following the overthrow of Saddam Hussein in 2003, the three men conspired with others to pay bribes to public officials at the Iraqi South Oil Company and the Iraqi Ministry of Oil to secure oil contracts for Unaoil and SBM Offshore. Al Jarah previously admitted to paying bribes totaling over $6 million to secure contracts worth $800 million for the supply of oil pipelines and offshore mooring buoys. Akle and Whiteley were found guilty of paying over $500,000 in bribes to secure a $55 million contract for the offshore mooring buoys.

https://www.sfo.gov.uk/2020/07/13/

7/16/2020: The DOJ filed a sealed indictment in the Southern District of Texas against José Luis De Jongh Atensio, a dual U.S. and Venezuelan citizen who worked as a procurement officer and manager for Citgo Petroleum Corporation (Citgo). According to documents since unsealed, between 2013 and 2019, De Jongh agreed to accept bribe payments from businessmen, including José Manuel Gonzalez Testino and Tulio Anibal Farias Perez, who were charged in a separate proceeding, in exchange for assisting the businessmen and related companies conducting business with Citgo and Petroleos de Venezuela SA (PDVSA). De Jongh received over $2.5 million in bribes and assisted Gonzalez and Farias with procuring Citgo and PDVSA contracts. De Jongh also allegedly received gifts and other things of value from Gonzalez, Farias, and others, including tickets to a World Series game, the Super Bowl, and a U2 concert.

https://www.justice.gov/opa/pr/former-venezuelan-official-charged-connection-international-bribery-and-money-laundering

7/20/2020: Former Alstom executive and government cooperator Edward Thiessen was sentenced to time served for his role in a scheme to bribe Indonesian officials to get Alstom business with the state-owned power company. Thiessen pleaded guilty last year to conspiring to violate the FCPA and testified at the trial of former fellow Alstom executive Lawrence Hoskins. Thiessen and Hoskins were among the individuals charged in the U.S. over a scheme to win a $118 million energy contract in Indonesia. Thiessen started cooperating after prosecutors approached him in 2014 and agreed to plead guilty soon thereafter. In addition to testifying at Hoskins' trial, Thiessen pointed prosecutors to a 2003 email involving Hoskins containing a "Friends Analysis" showing a consultant's connections to Indonesian officials. Based on that help and the fact that Thiessen was a "minimal" participant in the scheme, prosecutors asked the judge to give him much less time than Hoskins. During his sentencing, Thiessen told the judge that after being forced to retire from Alstom amid the bribery investigation in 2014, he declined other job offers in Indonesia because he knew they would likely have required him to wade back into moral gray areas. The judge noted his choice to do so and credited Thiessen's six-year cooperation in Hoskins' case.

7/27/2020: David Rothschild, a former vice president at API, was sentenced to one-year probation for his involvement in paying bribes to secure a project in Indonesia. Rothschild began cooperating with the FBI in 2010 and pleaded guilty to an FCPA charge in 2012, becoming the first individual in the case to enter a guilty plea. Prosecutors said his cooperation and guilty plea led to a wave of pleas from his former colleagues.

7/28/2020: The Malaysian High Court found former Prime Minister Najib Razak guilty of transferring about $10 million from the sovereign wealth fund known as 1Malaysia Development Berhad (1MDB). For his conduct, a judge imposed a 12-year prison sentence, which has been suspended due to appeal. Najib, who served as prime minister from 2009 to 2018, was reported to have deposited approximately $700 million from 1MDB into his personal accounts. He faces more trials in Malaysia on at least 35 additional corruption charges.

https://www.bbc.com/news/world-asia-53563065

7/28/2020: A federal judge ruled that José Carlos Grubisich, Braskem S.A.'s former chief executive, can remain under house arrest after noting that he—along with other defendants—is unlikely to go to trial anytime soon amid the COVID-19 pandemic. U.S. Magistrate Judge Steven Gold said that, "[w]ith the pandemic continuing and new cases rising, the question of when a jury trial will be scheduled for a defendant-at-liberty is open, uncertain and will surely be delayed into next year at a minimum." Grubisich, who left his role at Braskem in 2008, was charged in November for his alleged involvement in a bribery scheme involving a $250 million slush fund used to pay off government officials and political parties in Brazil. Grubisich, a Brazilian national, has been in the U.S. for about 10 months and remains under house arrest in New York.

https://www.justice.gov/criminal-fraud/file/1297156/

8/6/2020: World Acceptance Corporation (WAC), a South Carolina-based consumer loan company, has agreed to pay $21.7 million to resolve charges that it violated the FCPA. The SEC order found that from at least December 2010 through June 2017, WAC's former Mexican subsidiary, WAC de Mexico S.A. de C.V. (WAC Mexico), paid more than $4 million in bribes to Mexican government officials and union officials to secure the ability to make loans to government employees and to ensure that those loans were repaid in a timely manner. According to the SEC order, WAC Mexico paid the bribes in a variety of ways, including by depositing money into bank accounts linked to the officials and by hiring an intermediary to distribute large bags of cash among the officials. The order also found that these bribes were inaccurately recorded in WAC's books and records as legitimate business expenses, that WAC lacked internal accounting controls sufficient to detect or prevent the payment of such bribes, and that management lacked the appropriate tone at the top regarding internal audit and compliance, thereby undermining the effectiveness of those functions.

https://www.sec.gov/litigation/admin/2020/34-89489.pdf

Relatedly, WAC also published a declination letter from DOJ related to an investigation into the same activity in Mexico. DOJ found bribery in Mexico but declined to bring an enforcement action pursuant to its FCPA Corporate Enforcement Policy, citing to WAC's self-disclosure, proactive cooperation, and remediation.

https://www.justice.gov/criminal-fraud/file/1301826/

8/6/2020: The trial of Gordon Coburn and Steven Schwartz, two former top Cognizant Technology Solutions executives charged with bribery, will be delayed until next May due to the ongoing effect of the COVID-19 pandemic. Coburn and Schwartz had been scheduled to go on trial in September to defend against charges filed in February 2019. Both men are charged with their alleged involvement in a scheme to bribe Indian officials in order to speed up the construction of a Cognizant campus in the India state of Tamil Nadu.

https://www.justice.gov/opa/pr/former-president-and-former-chief-legal-officer-publicly-traded-fortune-200-technology

8/11/2020: Lennys Rangel, a former procurement officer for the Petrocedeño division of PDVSA, pleaded guilty to conspiring to launder money in connection with a bribery scheme. According to court filings, Rangel received instructions from senior PDVSA officials to assist and expedite the award of Petrocedeño contracts, which ultimately yielded benefits for those senior PDVSA officials and other Venezuelan officials and generals. Rangel ensured that Petrocedeño contracts were given to Miami-area contractors by overseeing $5 million in bribe payments. Rangel laundered money through bank accounts in her name as well as those of her relatives and friends. No sentencing hearing has been set.

https://www.justice.gov/criminal-fraud/file/1270496/

8/14/2020: Three women were charged in a 13-count indictment in the Northern District of Ohio for their alleged roles in schemes to corruptly and fraudulently procure adoptions of Ugandan and Polish children through bribing Ugandan officials and defrauding U.S. adoptive parents, U.S. authorities, and a Polish regulatory authority. With respect to the Uganda scheme, the indictment alleges that Debra Parris of Lake Dallas, Texas, and Dorah Mirembe of Kampala, Uganda, together with others, engaged in a scheme to pay bribes to Ugandan officials to corruptly procure the adoption of Ugandan children by families in the U.S., including the adoption of children who were not properly determined to be orphaned and who had to be ultimately returned to their birth parents.

https://www.justice.gov/opa/pr/three-individuals-charged-arranging-adoptions-uganda-and-poland-through-bribery-and-fraud

8/28/2020: Herbalife Nutrition Ltd. has agreed to pay more than $67 million to settle charges that it violated the books and records and internal accounting controls provision of the FCPA. The SEC order found that Herbalife's Chinese subsidiaries made payments and provided meals, gifts, and other benefits to Chinese officials in connection with obtaining sales licenses, curtailing government investigations of Herbalife China, and removing negative coverage of Herbalife China in state-owned media. As set forth in the order, Herbalife China managers asked employees to falsify expense documents in an effort to conceal the improper payments. The order found that Herbalife executives received reports of high travel and entertainment spending in China and violations of Herbalife's internal FCPA policies but failed to detect and prevent improper payments and benefits and the falsified expense reports. The order further found that the improper payments and benefits were recorded inaccurately in Herbalife's books and records and that Herbalife failed to devise and maintain a sufficient system of internal accounting controls. For its conduct, Herbalife has agreed to pay disgorgement of more than $58.6 million and prejudgment interest of more than $8.6 million and to report on the status of its remediation and compliance measures for a three-year period.

https://www.sec.gov/litigation/admin/2020/34-89704.pdf

In a parallel action, DOJ announced that Herbalife will pay a criminal fine of more than $55 million. Herbalife entered into a DPA with the Criminal Division's Fraud Section and the U.S. Attorney's Office for the Southern District of New York in connection with a criminal information charging Herbalife with one count of conspiracy to violate the books and records provision of the FCPA. According to its admissions, between 2007 and 2016, Herbalife knowingly and willfully conspired with others in a scheme to falsify its books and records and provide corrupt payments and benefits to Chinese government officials. Herbalife carried out the scheme for the purpose of obtaining, retaining, and increasing Herbalife's business in China by, among other things, (i) obtaining and retaining certain direct selling licenses for Herbalife China; (ii) improperly influencing certain Chinese governmental investigations into Herbalife China's compliance with Chinese laws; and (iii) improperly influencing certain Chinese state-owned and state-controlled media for the purpose of removing negative media reports about Herbalife China. As part of the agreement, Herbalife has agreed to continue to cooperate with the U.S. government in any ongoing or future criminal investigations concerning Herbalife, its executives, employees, or agents, to enhance its compliance program, and to report to the government on the implementation of its enhanced compliance program.

https://www.justice.gov/opa/pr/herbalife-nutrition-ltd-agrees-pay-over-122-million-resolve-fcpa-case

9/22/2020: Sargeant Marine Inc., an asphalt company formerly based in Boca Raton, Florida, pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA and agreed to pay a criminal fine of $16.6 million to resolve charges stemming from a scheme to pay bribes to foreign officials in three South American countries. According to its admissions, between 2010 and 2018, the company and its affiliated companies engaged in a scheme to bribe foreign officials in Brazil, Venezuela, and Ecuador. In Brazil, Sargeant Marine admitted to bribing a minister in the Brazilian government, a high-ranking member of the Brazilian congress, and senior executives at Petróleo Brasileiro S.A. (Petrobras) to obtain valuable contracts to sell asphalt. Sargeant Marine also admitted that between approximately 2012 and 2018, it bribed four PDVSA officials in Venezuela in exchange for inside information and for their assistance in steering contracts to purchase asphalt from PDVSA to a Sargeant Marine nominee. Furthermore, Sargeant Marine admitted that it bribed an official at Ecuador's state-owned oil company, EP Petroecuador, to secure a 2014 contract to supply asphalt.

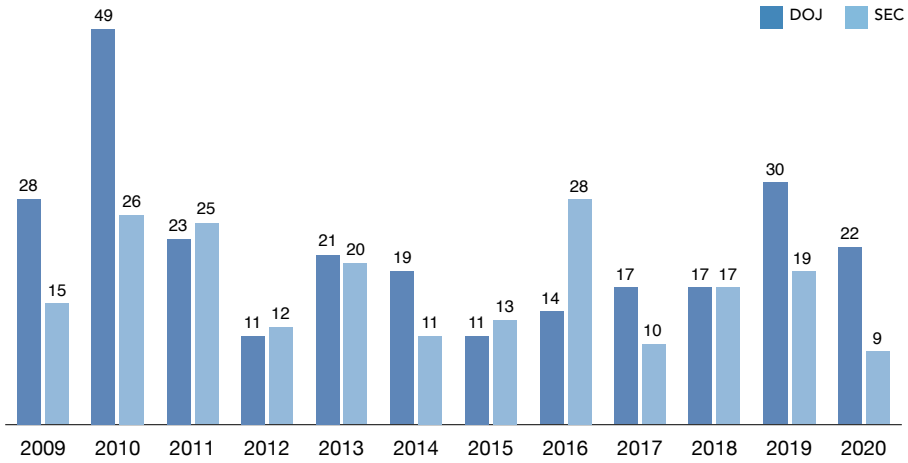
https://www.justice.gov/opa/pr/sargeant-marine-inc-pleads-guilty-and-agrees-pay-166-million-resolve-charges-related-foreign

9/22/2020: Federal prosecutors in New York announced the filing of an indictment against Javier Aguilar, a former manager at the U.S. subsidiary of the world's largest independent oil trader, for his alleged involvement in a scheme to pay bribes to obtain a contract from Petroecuador. According to the indictment, Aguilar was allegedly involved in paying $870,000 in bribes to Ecuadorean officials to secure a $300 million fuel oil contract in 2016. Prosecutors said the scheme lasted from 2015 to 2020 and that Aguilar used fraudulent consulting agreements to funnel money through bribe intermediaries.

https://www.reuters.com/article/usa-ecuador-corruption/u-s-charges-former-manager-of-european-oil-firm-over-graft-in-ecuador

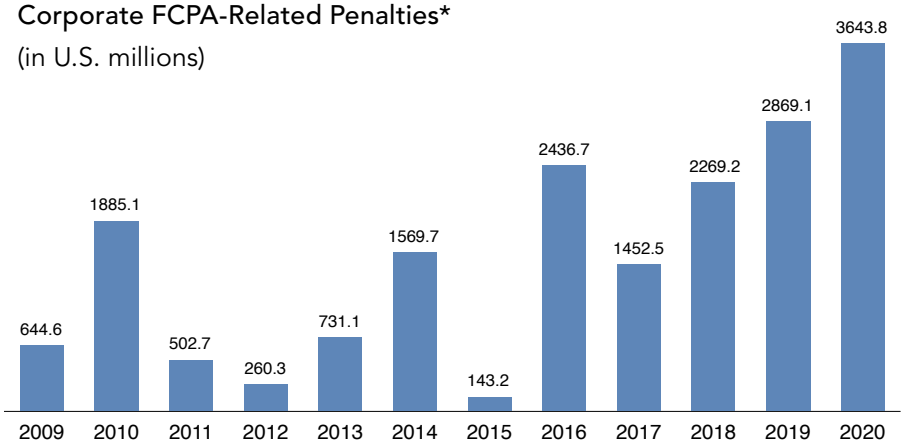
FCPA GOVERNMENT INVESTIGATIONS AND CORPORATE SETTLEMENTS

FCPA-Related Cases*



* New criminal or civil cases (settled or contested) instituted by year

Corporate FCPA-Related Penalties*
(in U.S. millions)



* Includes disgorgement; does not include non-U.S. fines

THE FCPA/ANTI-CORRUPTION PRACTICE OF SIDLEY AUSTIN LLP

Our FCPA/Anti-Corruption practice, which involves over 90 of our lawyers, includes creating and implementing compliance programs for clients, counseling clients on compliance issues that arise from international sales and marketing activities, conducting internal investigations in more than 90 countries and defending clients in the course of SEC and DOJ proceedings. Our clients in this area include Fortune 100 and 500 companies in the pharmaceutical, healthcare, defense, aerospace, energy, transportation, advertising, telecommunications, insurance, food products and manufacturing industries, leading investment banks and other financial institutions.

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