October 16, 2020

FCPA DEVELOPMENTS: Q3 2020

Despite the challenges posed by the global coronavirus pandemic, the DOJ and the SEC remained at "full speed" in FCPA enforcement in the third quarter of 2020, with three corporate resolutions by the DOJ and four resolutions by the SEC.[1] Additionally, FCPA charges were publicly filed against three individuals, four guilty pleas were unsealed for individuals who had been charged between 2017 and 2019, and two individuals were sentenced on FCPA convictions. In addition to the above enforcement activity, the DOJ and the SEC announced notable policy updates in the third quarter.

Our thoughts on the most significant developments in anti-corruption and FCPA enforcement and policy during the third quarter are below.

Overview of FCPA Enforcement Policy Developments

The DOJ and the SEC announced several significant policy updates in the third quarter of 2020, including an updated edition of the FCPA Resource Guide that was originally published in 2012, important amendments to the SEC's Whistleblower Program, and OMB "best practice" policies that may affect the SEC's FCPA enforcement activities. The DOJ also issued its first FCPA advisory opinion in six years in the third quarter. We summarize these developments below.

DOJ and SEC Update FCPA Resource Guide to Reflect Developments Since 2012

In July 2020, the DOJ Criminal Division and the SEC jointly released the second edition of ***A Resource Guide to the* U.S. Foreign Corrupt Practices Act** (the "2020 Resource Guide"). The first edition of the Resource Guide was released in November 2012, marking the first time the U.S. authorities had published a compilation of detailed information about their interpretation and enforcement of the FCPA.

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1 *See* Christopher Cestaro, Chief, U.S. Dep't of Just. Fraud Section FCPA Unit, Remarks at the Practising Law Institute: The Foreign Corrupt Practices Act and International Anti-Corruption Developments 2020 Panel (Sept. 3, 2020).

In a foreword announcing the updated guidance, former Assistant Attorney General Brian Benczkowski, former SEC Enforcement Division Co-Director Steven Peikin, and current SEC Enforcement Division Director Stephanie Avakian noted that "[a]lthough many aspects of the [original] *Guide* continue to hold true today, the last eight years have also brought new cases, new law, and new policies. The Second Edition of the Guide reflects these updates."[2] While the 2020 Resource Guide indeed breaks little new ground, it does update the 2012 Resource Guide to incorporate legal and policy developments in FCPA enforcement, and fresh case examples, since 2012. The most notable of those updates are discussed below.

DOJ FCPA Corporate Enforcement Policy: The 2020 Resource Guide adds a new section discussing the DOJ FCPA Corporate Enforcement Policy that applies to criminal prosecutions and corporate resolutions in the FCPA context. As we wrote when first announced in November 2017, the policy provides that "where a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances."[3] The policy—which has been revised over the years to clarify the information companies need to disclose, and when, to obtain leniency—was incorporated into the Justice Manual and was intended to incentivize companies to disclose FCPA violations and provide robust cooperation in subsequent investigations. The 2020 Resource Guide notes that "[a]ggravating circumstances that may warrant a criminal resolution instead of a declination include, but are not limited to: involvement by executive management of the company in the misconduct; a significant profit to the company from the misconduct; pervasiveness of the misconduct within the company; and criminal recidivism."[4] Of note, however, the 2020 Resource Guide acknowledges that "[e]ven where aggravating circumstances exist, DOJ may still decline prosecution, as it did in several cases in which senior management engaged in the bribery scheme," citing at least three declination letters issued in the past two years.[5] Finally, the 2020 Resource Guide clarifies that the Corporate Enforcement Policy "applies only to DOJ, and does not bind or apply to SEC."[6]

Evaluation of Corporate Compliance Programs: The 2020 Resource Guide expands on the guidance provided in the DOJ's and SEC's evaluation of corporate compliance programs. The DOJ compliance program guidance, first released in February 2017, makes public a list of questions the DOJ's Fraud Section may ask a company when assessing the quality of its compliance program. That compliance program guidance was updated in April 2019 to focus on three key questions: (1) Is the corporation's compliance

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2 U.S. Dep't of Just. & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the* U.S. Foreign Corrupt Practices Act, *Second Edition* (2020), https://www.justice.gov/criminal-fraud/file/1292051/download [hereinafter "2020 Resource Guide"].

3 *Id.* at 51.

4 *Id.*

5 *Id.* at 51–52 and n.301.

6 *Id.*

program well designed? (2) Is the program being applied earnestly and in good faith? (In other words, is the program being implemented effectively?) and (3) Does the corporation's compliance program work in practice? The 2020 Resource Guide incorporates the latest updates to the compliance program guidance released in June 2020. Notably, the 2020 Resource Guide clarifies that both the DOJ and SEC "employ a common-sense and pragmatic approach" and utilize the questions in the guide to evaluate compliance programs.

Conspiracy and Accomplice Liability for FCPA Anti-Bribery Violations: The 2020 Resource Guide now accounts for the Second Circuit's 2018 decision in *United States* v. *Hoskins*, which limited the FCPA's extraterritorial jurisdiction over non-U.S. nationals based on conspiracy or accomplice liability theories. The Guide acknowledges that, at least in the Second Circuit, foreign actors may be criminally prosecuted for conspiring to violate the FCPA's anti-bribery provisions or aiding and abetting such a violation *only* if they have a specific nexus to the U.S., as expressly listed in the FCPA's anti-bribery provisions.[7] The 2020 Resource Guide deletes the DOJ's and SEC's position in the 2012 Resource Guide—now overruled by *Hoskins*—that foreign actors can be prosecuted "regardless of whether the foreign national or company itself takes any action in the United States."[8] Of note, however, the 2020 Resource Guide recognizes that at least one district court in the Seventh Circuit has rejected the *Hoskins* decision, leaving some ambiguity with regard to whether or how the DOJ will prosecute conspiracy or accomplice liability theories outside the Second Circuit.[9]

Mergers and Acquisitions and Successor Liability: Post-acquisition due diligence and successor liability have become significant issues in FCPA enforcement, as we have previously discussed here and here. In the 2020 Resource Guide, the DOJ and SEC note that, where "robust pre-acquisition due diligence may not be possible," the agencies "will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts."[10] The 2020 Resource Guide cites recent enforcement actions and declinations in this area and emphasizes that "an acquiring company that

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7 *Id*. at 36.

8 *Compare* U.S. Dep't of Justice & U.S. Sec. & Exch. Comm'n, *A Resource Guide to the* U.S. Foreign Corrupt Practices Act, at 12 (2012), https://www.justice.gov/iso/opa/resources/2952012111410143819803 1.pdf, *with* 2020 Resource Guide, at 11. The Guide also deletes language in a hypothetical from the 2012 Resource Guide stating that a foreign actor who has never taken any actions in U.S. territory "can still be subject to jurisdiction under a traditional application of conspiracy law and may be subject to substantive FCPA charges . . . for the reasonably foreseeable substantive FCPA crimes committed by a co-conspirator." *Id*.

9 2020 Resource Guide, at 36.

10 *Id*. at 29.

voluntarily discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity."[11]

Imposition of Compliance Monitors: The 2020 Resource Guidance clarifies factors the DOJ considers to determine whether the imposition of a corporate compliance monitor is appropriate, as we previously discussed here. The 2020 Resource Guide further notes that "[w]here a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced *at the time of resolution*, a monitor will likely not be necessary,"[12] mirroring a recent point of emphasis in the DOJ's guidance of the Evaluation of Corporate Compliance Programs that the adequacy and effectiveness of the corporation's compliance program be measured at the time of the offense as well as at the time of a charging decision and resolution, rather than examining just one "snapshot" in time.[13]

Forfeiture and Disgorgement: The 2020 Resource Guide includes a new, extended discussion on forfeiture and disgorgement, noting that, in addition to criminal or civil penalties, companies may be required to forfeit the proceeds of their crimes or disgorge the profits generated from the crimes, to "ensur[e] that the perpetrator does not profit from the misconduct."[14] This section also discusses two recent, significant Supreme Court decisions pertaining to disgorgement, highlighting *Kokesh* v. *SEC*, where the Supreme Court ruled that the civil disgorgement remedy is subject to a five-year statute of limitations, and *Liu* v. *SEC*, where the Court ruled that disgorgement is permissible equitable relief only when: (1) it does not exceed a wrongdoer's net profits; and (2) it is awarded to compensate victims. Although the new section on disgorgement does not explain how the SEC intends to approach the *Liu* factors, Stephanie Avakian, director of the SEC Enforcement Division, commented that the Commission is "dedicating resources to evaluating the impact of [the *Liu*] decision" and, as a result, companies should "expect to see some changes in the balance between the penalties and disgorgement" that the SEC seeks, with higher penalties in cases "where the statutory scheme permits."[15] There is no clear indication that *Liu* had a material impact on the SEC's FCPA resolutions in the third quarter of 2020 but, as noted in the Corporate Resolutions section below, disgorgement remains a significant tool in SEC FCPA settlements.

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11 *Id*. at 29–32.

12 *Id*. at 74 (emphasis added).

13 U.S. Dep't of Just., Crim. Div., *Evaluation of Corporate Compliance Programs* at 14 (June 1, 2020), https://www.justice.gov/criminal-fraud/page/file/937501/download.

14 2020 Resource Guide, at 71.

15 *See* Stephanie Avakian, Director, Sec. & Exch. Comm'n, Remarks at the Institute for Law and Economics, University of Pennsylvania Carey Law School Virtual Program (Sept. 17, 2020), https://www.sec.gov/news/speech/avakian-protecting-everyday-investors-091720.

Statute of Limitations in Criminal Cases: The 2020 Resource Guide now draws a distinction between the statutes of limitations for the FCPA's anti-bribery provisions and the accounting provisions.[16] The Guide notes that for substantive violations of the FCPA anti-bribery provisions, the general five-year limitations period set forth in 18 U.S.C. § 3282 applies. In contrast, for violations of the FCPA accounting provisions, which are defined as "securities fraud offense[s]" under 18 U.S.C. § 3301, there is a limitations period of six years. This point may well be one of the more consequential updates for issuers, as it has potential implications for the scope of investigations, the length of corporate document retention policies, and the temporal reach of government FCPA investigations.

Coordinated Resolutions: New to the 2020 Resource Guide is a discussion of the DOJ and SEC efforts to avoid "piling on" by crediting fines, penalties, forfeiture and disgorgement assessed by foreign authorities resolving investigations with the same company for the same conduct.[17] As we wrote when announced in May 2018, the DOJ has memorialized in the Justice Manual the practice of coordinating resolutions to avoid "piling on." The 2020 Resource Guide highlights that the DOJ has coordinated resolutions with foreign authorities in more than 10 cases, and the SEC has coordinated resolutions with foreign authorities in at least five.[18]

Law Enforcement Partners: The 2020 Resource Guide notes the growing number of U.S. enforcement agencies investigating FCPA violations.[19] As we wrote in March 2019, the Commodity Futures Trading Commission ("CFTC") announced for the first time its commitment to investigating cases involving foreign corruption in commodities markets. The 2020 Resource Guide discusses this and a number of additional agencies now involved in the fight against international corruption, including multiple dedicated FBI squads and agents from the U.S. Postal Inspection Service ("USPIS"), as well as regulatory partners in the Financial Crimes Enforcement Network ("FinCEN") and the Federal Reserve.

Gifts, Travel, Entertainment and Other Payments to Third-Parties: Finally, the 2020 Resource Guide provides fresh examples of settlement actions involving gifts and hospitality, travel and entertainment, and other payments to third parties. Examples include paying for foreign officials to travel to sporting events, paying for school tuition for the children of foreign officials, and shipping luxury vehicles to foreign officials.[20]

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16 *Id*. at 36–37.

17 *Id*. at 71.

18 *Id*.

19 *Id*. at 5.

20 *Id*. at 15.

SEC Whistleblower Program Amendments

On September 23, 2020, the SEC adopted amendments to the rules governing the SEC Whistleblower Program and the monetary awards made to whistleblowers who voluntarily report potential wrongdoing.[21] The amendments, approved by a 3-2 vote of the SEC Commission, are intended to clarify the SEC's discretion in determining award amounts and could change how the SEC pays out some of its largest whistleblower awards. According to SEC Chairman Jay Clayton, these amendments are intended to "increase the speed and efficiency of preliminary determinations and awards."[22]

The new rules allow the SEC to streamline the award evaluation process by providing a mechanism for whistleblowers with potential awards of less than $5 million to qualify for a presumption that they will receive the maximum statutory award amount. The SEC said the amendments would help the agency process whistleblower claims faster and issue awards more efficiently, considering that awards of less than $5 million historically have represented nearly 75% of all whistleblower awards.[23] Other awards will continue to be evaluated consistent with past practice.

The amendments also affirm that award amounts—which the Commission, in its discretion, can determine in percentage terms, dollar terms or some combination—are to be determined exclusively based on the application of the award factors set forth in the Commission's whistleblower rules. As a result, there will be no separate assessment of whether award amounts are too small or too large. The amendments further clarify that the Commission may waive compliance with the Tips, Complaints, and Referrals ("TCR") filing requirements, which are used to intake and process tips and complaints, if a whistleblower complies with the requirements within 30 days of first providing the information or of first obtaining actual or constructive notice of the TCR filing requirements.

OMB Guidance on SEC Enforcement "Best Practices"

In response to the impact of COVID-19 on the U.S. economy, in May 2020, President Trump signed Executive Order 13924 (the "Order"), pursuant to which he directed executive departments and agencies to

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21 *See* Whistleblower Program Rules, Exchange Act Release No. 34-88963 (Sept. 23, 2020), https://www.sec.gov/rules/final/2020/34-89963.pdf.

22 *See* Jay Clayton, Chairman, Sec. & Exch. Comm'n, *Strengthening Our Whistleblower Program* (Sept. 23, 2020), https://www.sec.gov/news/public-statement/clayton-whistleblower-2020-09-23.

23 *See* Press Release, Sec. & Exch. Comm'n, *SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program* (Sept. 23, 2020), https://www.sec.gov/news/press-release/2020-219.

"remove barriers to . . . economic prosperity" by "revis[ing] their procedures and practices," considering "the principles of fairness in administrative enforcement and adjudication."[24]

On August 31, 2020, OMB published guidance on "best practices" to help administrative agencies, such as the SEC, review and revise existing procedures pursuant to the Order.[25] The guidance includes, among other measures, a recommendation that "[a]gencies should consider applying the rule of lenity in administrative investigations, enforcement actions, and adjudication" and "should establish policies of enforcement discretion that decline enforcement or the imposition of a penalty, as appropriate, in the course of enforcement when the agency determines that the regulated party attempted in good faith to comply with the law."

SEC FCPA enforcement policies are subject to OMB's guidance, although these "best practices" are not binding and the SEC would have to issue rulemaking or other policies before it could adopt any of OMB's directives. Nevertheless, OMB's "best practices" are placing a magnifying glass on increased leniency toward the targets of investigations and enforcement actions, and, conversely, greater limits to the duration of investigations. Whether the SEC implements such "best practices" in the months or years ahead remains to be seen.

DOJ FCPA Advisory Opinion

On August 14, 2020, the DOJ issued its first FCPA advisory opinion since November 2014, advising a U.S.-based company that a payment to the foreign subsidiary of a foreign state-owned bank would not trigger an enforcement action.[26] According to the Opinion Procedure Release, an anonymous multinational company based in the U.S. (the "Company") bought a portfolio of assets worth $47.5 million from a foreign investment bank's foreign subsidiary in February 2019. At the time, a majority of shares of the foreign investment bank were indirectly owned by a foreign government. In March 2019, a different foreign subsidiary of the foreign bank, which had assisted in the sale, requested a $237,500 payment, equal to 0.5% of the assets' value, as compensation for "analytical and advisory services" it had performed on behalf of the Company.

The DOJ determined that, based on the facts and circumstances, the payment to the foreign subsidiary would not amount to an FCPA violation because: *first*, the payment would be made to a foreign government

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24 *See* Exec. Order No. 13924, 85 Fed. Reg. 31,353 (May 19, 2020), https://www.federalregister.gov/documents/2020/05/22/2020-11301/regulatory-relief-to-support-economic-recovery.

25 *See* Off. of Mgmt. & Budget, Exec. Off. of the President, *Implementation of Section 6 of Executive Order 13924* (M-20-31) (Aug. 31, 2020), https://www.whitehouse.gov/wp-content/uploads/2020/08/M-20-31.pdf.

26 U.S. Dep't of Just., FCPA Review, Opinion Procedure Release No. 20-01 (Aug. 14, 2020), https://www.justice.gov/criminal-fraud/file/1304941/download.

or foreign government instrumentality, not a foreign official, and the "FCPA does not prohibit payments to foreign governments or foreign government instrumentalities"; *second*, there was no indication that the money would be diverted to any individual, and the foreign subsidiary's Chief Compliance Officer certified that the payment would be used for general corporate purposes; and *third*, because the Company "sought and received specific, legitimate services" from the foreign bank subsidiary that were "commensurate with the services . . . provided."[27]

The DOJ issued its advisory opinion pursuant to the Department's "FCPA Opinion Procedure," 28 C.F.R. § 80.4, which enable an "issuer" or "domestic concern" to obtain an opinion as to whether certain specified, prospective—not hypothetical—conduct conforms with the DOJ's present enforcement policy regarding the FCPA's anti-bribery provisions. In a July 2018 speech, former DOJ Deputy Assistant Attorney General Matthew Miner, like several of his predecessors in that role, encouraged companies to seek guidance through the FCPA Opinion Procedure, noting that although the procedure "may take a little more time – and we can, to a degree, expedite our analysis based on timing needs – it sometimes makes sense to slow down to assess risks."[28]

As the latest Opinion demonstrates, however, even in a fairly straightforward case such as this one, the opinion procedure is not a quick process. This may in part explain its very infrequent use. Here, the Company initially submitted its opinion request on November 5, 2019, and provided supplemental information on January 15, 2020, February 10, 2020, June 18, 2020, and July 17, 2020. The DOJ issued its relatively unremarkable opinion on August 14, 2020—more than nine months after the Company's request was submitted. As such, it is worth noting that the opinion procedure may not be a realistic option in circumstances where time is of the essence.

Corporate Resolutions

Overview

In the third quarter of 2020, the DOJ and the SEC resolved seven corporate FCPA enforcement actions against five corporate defendants, resulting in $529.4 million in combined fines, penalties, disgorgement and pre-judgment interest, of which $306.2 million was assessed by the DOJ and $223.2 million by the SEC. There were also several declinations disclosed by companies in the last quarter, as at least two U.S. companies (World Acceptance Corporation, KBR, Inc.) and one foreign company (GlaxoSmithKline plc)

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27 *Id*. at 3.

28 *See* Matthew S. Miner, Deputy Assistant Att'y Gen., Dep't of Justice, Remarks at the American Conference Institute 9th Global Forum on Anti-Corruption Compliance in High Risk Markets (July 25, 2018), https://www.justice.gov/opa/pr/deputy-assistant-attorney-general-matthew-s-miner-remarks-american-conference-institute-9th.

disclosed that the DOJ and/or the SEC had declined prosecution in previously announced FCPA investigations.[29]

We summarize below select resolutions from the past quarter.

Sargeant Marine

On September 22, 2020, Sargeant Marine Inc. ("SMI"), a Florida-based company that provides asphalt products, pleaded guilty to conspiracy to violate the FCPA's anti-bribery provisions and agreed to pay a criminal fine of $16.6 million to resolve charges stemming from bribery schemes in Brazil, Venezuela and Ecuador.[30] As a result of the bribery schemes, SMI and its affiliated companies earned profits in excess of $38 million.[31]

Between 2010 and 2018, SMI bribed executives and high-ranking government officials to win contracts to sell asphalt to Petróleo Brasileiro S.A. ("Petrobras"), Petroleos de Venezuela S.A. ("PDVSA"), and Empresa Publica de Hidrocarburos del Ecuador ("Petroecuador"), the state-owned oil companies for Brazil, Venezuela and Ecuador, respectively. SMI engaged various intermediaries with close ties to decision makers at the oil companies, and then paid commissions on a per barrel basis to the intermediaries pursuant to sham consulting agreements. The intermediaries used the commission payments to pay bribes to the government officials at the state-owned oil companies on behalf of SMI.

Notably, SMI received a $73.4 million reduction off its criminal penalty because the company claimed, and the DOJ independently verified, that SMI was unable to pay the full penalty.[32] According to SMI's plea agreement, due to the severity of the company's violations, SMI's minimum fine was $120 million under the U.S. Sentencing Guidelines.[33] Although SMI did not voluntarily self-disclose its misconduct, the company received a 25 percent discount because of its "full cooperation and remediation," for a total criminal penalty of $90 million.[34] SMI claimed, however, that a large criminal penalty would make it

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29 One company announced a declination by the DOJ (World Acceptance Corporation), and two companies announced declinations by both the DOJ and the SEC (KBR, GlaxoSmithKline).

30 *See United States* v. *Sargeant Marine, Inc.*, Cr. No. 20-CR-363 (E.D.N.Y.); *see also* Press Release, Dep't of Just., Sargeant Marine Inc. Pleads Guilty and Agrees to Pay $16.6 Million to Resolve Charges Related to Foreign Bribery Schemes in Brazil, Venezuela, and Ecuador (Sept. 22, 2020), https://www.justice.gov/opa/pr/sargeant-marine-inc-pleads-guilty-and-agrees-pay-166-million-resolve-charges-related-foreign.

31 *See* Information at 11–12, *United States* v. *Sargeant Marine, Inc.*, Cr. No. 20-CR-363 (E.D.N.Y. Sept. 22, 2020).

32 *See* Plea Agreement at 6, 19, *United States* v. *Sargeant Marine, Inc.*, Cr. No. 20-CR-363 (E.D.N.Y. Sept. 21, 2020).

33 *Id*. at 18.

34 *Id*. at 4–5, 18–19.

insolvent, so federal prosecutors reduced the company's criminal penalty to $16.6 million based on its demonstrated inability to pay—a discount of more than 80 percent.[35]

According to senior DOJ officials, this marks the first time prosecutors have applied the DOJ's guidance on inability-to-pay claims to a FCPA case.[36] The DOJ's inability-to-pay guidance, issued in October 2019, was meant to create consistency and a formal process for addressing inability-to-pay claims—as well as transparency around how such claims are resolved.[37] Without providing specific details, the DOJ identified two factors that contributed to the determination that SMI could not pay the full penalty: (1) the company's current financial condition—including its income, earning capacity and resources—had been impacted by the sale of its interest in a joint venture; and (2) the company had limited alternative sources of capital, including potential loans against guaranteed future assets.[38]

In related charges, on September 18, 2020, the DOJ unsealed the guilty pleas of five individuals who played a major role in SMI's bribery scheme, including: Daniel Sargeant, a senior executive of SMI; Jose Tomas Meneses, a trader at SMI; Luiz Eduardo Andrade and David Diaz, consultants who acted as bribe intermediaries in Brazil and Venezuela, respectively; and Hector Nuñez Troyano, a former PDVSA official who received bribes in connection with the Venezuela contracts.[39] A sixth individual, Roberto Finocchi, also a trader at SMI, pleaded guilty in November 2017 for his role in the Brazil scheme.

World Acceptance

On August 6, 2020, World Acceptance Corporation, a South Carolina-based consumer loan company, agreed to pay $17.8 million in disgorgement, $1.9 million in prejudgment interest, and a $2 million civil

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35 *Id*. at 19.

36 Dylan Tokar, *Asphalt Company Got $70 Million Break on Penalty*, WALL ST. J. (Oct. 1, 2020), https://www.wsj.com/articles/asphalt-company-got-70-million-break-on-penalty-11601544601.

37 *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, *DOJ Announces Guidance for "Inability-to-Pay" Claims* (Oct. 10, 2019), https://www.paulweiss.com/media/3979024/10oct19-inability-to-pay-claims.pdf.

38 Plea Agreement at 6, *United States* v. *Sargeant Marine, Inc.*, Cr. No. 20-CR-363 (E.D.N.Y. Sept. 21, 2020).

39 *See* Press Release, Dep't of Just., Sargeant Marine Inc. Pleads Guilty and Agrees to Pay $16.6 Million to Resolve Charges Related to Foreign Bribery Schemes in Brazil, Venezuela, and Ecuador (Sept. 22, 2020), https://www.justice.gov/opa/pr/sargeant-marine-inc-pleads-guilty-and-agrees-pay-166-million-resolve-charges-related-foreign.

penalty, for a total payment of $21.7 million, to settle SEC charges that the company violated the FCPA's anti-bribery, books and records, and internal accounting controls provisions.[40]

According to the SEC's Order, between 2010 and 2017, World Acceptance Corporation's former Mexican subsidiary, WAC de Mexico S.A. de C.V., paid approximately $4.1 million in bribes to Mexican government officials and union officials to secure the ability to make small loans to government employees and to ensure that loan repayments continued to be sent to WAC Mexico in a timely manner.[41] WAC Mexico allegedly entered into at least 30 contracts with government entities and worker unions representing government employees, most of whom worked in healthcare and education. As a result of the bribery scheme, World Acceptance Corporation was unjustly enriched by about $18 million.[42]

The SEC further alleged that the bribe payments were inaccurately recorded as legitimate "commission" expenses in World Acceptance Corporation's books and records and that the company, as well as WAC Mexico, lacked the internal accounting controls to detect or prevent such payments.[43] For example, WAC Mexico did not have a vendor management system nor any formal procedures to approve new vendors, which allowed WAC Mexico to hire third-party intermediaries to pay bribes to government officials. World Acceptance Corporation also failed to identify the high risk of corruption in Mexico and, although the company had an FCPA policy in its corporate compliance manual, there was no effective formal monitoring to ensure that WAC Mexico was adhering to that policy. As an example, the SEC highlighted that World Acceptance Corporation's then-general counsel took over as the head of internal audit and compliance, even though the general counsel had no prior audit or accounting experience.[44] World Acceptance Corporation's then-CEO also told the then-general counsel that she did not care whether the company had a "world class [internal] audit function."

In determining to accept the settlement offer, the SEC considered World Acceptance Corporation's cooperation, including facilitating witnesses traveling from Mexico to the U.S. for interviews.[45] The SEC also considered the remedial acts promptly undertaken by the company, including terminating World Acceptance Corporation's CEO and general counsel, and the company divesting itself of WAC Mexico in mid-2018.

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40 *See In re World Acceptance Corp.*, Exchange Act Release No. 89489 (Aug. 6, 2020), https://www.sec.gov/litigation/admin/2020/34-89489.pdf; *see also* Press Release, Sec. & Exch. Comm'n, SEC Charges Consumer Loan Company With FCPA Violations (Aug. 6, 2020), https://www.sec.gov/news/press-release/2020-177.

41 *In re World Acceptance Corp.* ¶¶ 2, 6.

42 *Id.* ¶ 3.

43 *Id.* ¶¶ 10–11.

44 *Id.* ¶ 14.

45 *Id.* ¶ 20.

World Acceptance Corporation, which neither admitted nor denied the SEC's allegations, also received a public declination from the DOJ "despite the bribery committed by employees of the Company and its subsidiaries in Mexico."[46] Pursuant to the factors set forth in the DOJ's Corporate Enforcement Policy, the DOJ issued the declination based on World Acceptance Corporation's remediation and cooperation efforts, the company's prompt and voluntary self-disclosure of the misconduct in 2017, and the company's disgorgement of the full $18 million in ill-gotten gains to the SEC.

Novartis

On June 25, 2020, Novartis AG ("Novartis"), a Switzerland-based global pharmaceutical and healthcare company, Novartis Hellas S.A.C.I. ("Novartis Hellas"), a subsidiary of Novartis, and Alcon Pte Ltd ("Alcon"), a former subsidiary of Novartis and current subsidiary of Alcon Inc., a public multinational eye care company, agreed to pay a combined total of more than $346.7 million in monetary penalties and disgorgement to resolve DOJ and SEC investigations into FCPA violations.[47]

Specifically, Novartis Hellas paid a criminal penalty of $225 million and admitted to conspiring to violate the FCPA's anti-bribery and books and records provisions, entering into a three-year deferred prosecution agreement ("DPA") with the DOJ.[48] Between 2012 and 2015, Novartis Hellas conspired to bribe health care providers ("HCPs") employed by state-controlled hospitals and clinics in Greece to attend international "medical congresses" organized by medical associations in the U.S. and Europe, as a means to corruptly influence the HCPs to increase prescriptions of Novartis-branded drugs.[49] Novartis Hellas paid for the costs associated with attendance, such as airfare, hotel accommodations and registration fees.[50] In one instance, Novartis Hellas managers proposed sending ten HCPs to a U.S. congress at a total cost of $89,000.[51] In a separate scheme, from 2008 to 2012, Novartis Hellas made improper payments to HCPs related to clinical trials intended to increase sales of Novartis-branded prescription drugs.[52] Novartis Hellas

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46 *See* Letter from Robert Zink, Chief, U.S. Dep't of Just. Crim. Div. Fraud Sec., to Mark Schamel, Robert Ambler Jr., and James Connelly (Apr. 23, 2018), https://www.justice.gov/criminal-fraud/file/1301826/download.

47 *See* Deferred Prosecution Agreement, *United States* v. *Novartis Hellas S.A.C.I.*, No. 20-cr-538 (June 25, 2020) [hereinafter "Novartis Hellas DPA"]; Deferred Prosecution Agreement, *United States* v. *Alcon PTE Ltd*, No. 20-cr-538 (June 25, 2020) [hereinafter "Alcon DPA"]; *see also* Press Release, Dep't of Just., Novartis Hellas S.A.C.I. and Alcon Pte Ltd Agree to Pay over $233 Million Combined to Resolve Criminal FCPA Cases (June 25, 2020), https://www.justice.gov/opa/pr/novartis-hellas-saci-and-alcon-pte-ltd-agree-pay-over-233-million-combined-resolve-criminal.

48 Novartis Hellas DPA at 8–10.

49 Novartis Hellas DPA Statement of Facts ¶ 7.

50 *Id*. ¶ 11.

51 *Id*. ¶ 26.

52 *Id*. ¶¶ 28–29.

falsely recorded the corrupt payments associated with congress sponsorships and clinical trials as legitimate advertising and promotion expenses in the company's internal accounting records, which were consolidated into and used to support Novartis AG's financial reporting to the SEC.[53] Novartis Hellas realized at least $71 million in profits from prescription drug sales related to these schemes.[54]

Alcon paid a separate criminal penalty of $8.9 million and admitted to conspiring to violate the FCPA's books and records provision, also entering into a three-year DPA. Between 2007 and 2014, Alcon used a sham "consultancy program" to bribe HCPs in Vietnam through a third-party distributor in order to increase sales of Alcon's surgical equipment.[55] The distributor made direct payments to the HCPs—consisting mostly of doctors and nurses—and Alcon reimbursed the distributor for up to half the amount of the bribe payments. Alcon improperly recorded the reimbursements as "consultancy fees" and "marketing, human resources, or margin reconciliation costs."[56] The scheme continued after Alcon merged with Novartis AG in April 2011. Alcon's books, records and accounts were thereafter included in the consolidated financial statements that Novartis filed with the SEC. The DOJ estimates that, as a result of the improper payments to HCPs in Vietnam, Alcon realized approximately $8.5 million in profits between 2011 and 2014.[57]

In part due to the improper activities by its subsidiaries in Greece and Vietnam, Novartis consented to the entry of an SEC order requiring it to cease and desist from committing violations of the FCPA's books and records and internal accounting controls provisions.[58] According to the SEC Order, in addition to the bribe schemes involving Novartis Hellas and Alcon, personnel at Novartis Korea Ltd made similar corrupt payments to HCPs in Korea to increase prescriptions and sales of Novartis products over that of its competitors between 2011 and 2016.[59] According to the SEC, the bribe payments were improperly recorded in Novartis' consolidated books and records. The SEC estimates that Novartis was unjustly enriched by over $13.8 million from the improper conduct in Korea.[60] Novartis agreed to pay disgorgement of

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53 *Id.* ¶¶ 27, 39.

54 *Id.* ¶ 9.

55 Alcon DPA Statement of Facts ¶ 14.

56 *Id.* ¶ 26.

57 *Id.* ¶ 16.

58 *See In re Novartis AG*, Exchange Act Release No. 89149 (June 25, 2020), https://www.sec.gov/litigation/admin/2020/34-89149.pdf; *see also* Press Release, Sec. & Exch. Comm'n, SEC Charges Novartis AG with FCPA Violations (June 25, 2020), https://www.sec.gov/news/press-release/2020-144.

59 *In re Novartis AG* ¶ 28 (describing the HCP scheme in Korea). The SEC Order further alleges that internal accounting controls weaknesses at a Novartis subsidiary in China allowed personnel to forge contracts and create poorly performing deals for which the subsidiary "recorded large bad-debt provisions." *Id.* ¶¶ 2, 41–44.

60 *Id.* ¶ 35.

$92.3 million, $20.5 million in prejudgment interest and to self-report the status of its remediation and implementation of compliance measures for a period of three years.[61] Novartis acknowledged that the SEC did not impose a civil penalty based upon the imposition of a $233.9 million criminal fine in the above referenced DPAs.[62]

The DOJ also determined that a compliance monitor was unnecessary based on Novartis's and Alcon's "remediation and the state of their compliance programs," including: implementing revised and enhanced policies and procedures relating to accounting, anti-corruption, gifts, travel and entertainment, both globally and at the country level; enhancing controls relating to sponsorships to international medical congresses and clinical studies; and working with outside counsel to conduct an extensive internal investigation of Novartis's operations.[63]

Although the companies did not receive voluntary disclosure credit, each company received credit for full cooperation, including: conducting a thorough internal investigation, making factual presentations to the agencies, producing extensive documentation, including documents located outside of the U.S., and providing translations of foreign language documents. Alcon's $8.9 million criminal penalty reflects a 25 percent reduction off the bottom of the U.S. Sentencing Guidelines fine range because of Alcon's full cooperation with the government's investigation.[64] Meanwhile, Novartis Hellas's $225 million criminal penalty reflects a 25 percent reduction off a point near the midpoint of the U.S. Sentencing Guidelines range because, although Novartis Hellas fully cooperated and remediated, Novartis—its parent company—was involved in similar conduct in violation of the FCPA for which it had previously reached a resolution with the SEC in March 2016.[65] Novartis is the first FCPA corporate recidivist in the pharmaceutical sector.

Individual Prosecutions

Based on publicly available records, FCPA charges were brought against three individuals in the third quarter.

On September 22, 2020, a federal grand jury returned an indictment against Javier Aguilar, a former manager at Vitol Group, the multinational oil distributor and trading company, for his alleged participation

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61 *Id*. at 14.

62 *Id*. ¶ 53.

63 Novartis Hellas DPA at 4–5; Alcon DPA 4–5.

64 Alcon DPA at 5..

65 Novartis Hellas DPA at 5–6. In March 2016, Novartis reached a $25 million resolution with the SEC related to FCPA charges involving two of its subsidiaries in China. *See* Client Memorandum, Paul, Weiss, Rifkind, Wharton & Garrison LLP, *Novartis AG Settles SEC FCPA Action Involving China Subsidiaries' Improper Gifts, Travel and Entertainment Payments to Healthcare Providers* (Mar. 29, 2016), https://www.paulweiss.com/media/3413252/29mar16fcpaalert.pdf.

in a five-year bribery scheme involving payments to Ecuadorian officials.[66] The two-count indictment charges Aguilar, a Mexican citizen and U.S. resident, with conspiracy to violate the FCPA and conspiracy to commit money laundering. According to the DOJ, Aguilar paid $870,000 in bribes to Ecuadorian officials to help secure a $300 million contract to purchase fuel oil from Petroecuador. Between 2015 and July 2020, Aguilar and other co-conspirators allegedly used sham consulting agreements between bribe-paying intermediaries and offshore shell companies to conceal bribes to Ecuadorian officials in order to obtain and retain business for Vitol. If convicted, Aguilar faces a maximum jail sentence of 20 years.

On August 13, 2020, the DOJ charged two women—Debra Parris of Lake Dallas, Texas; and Dorah Mirembe of Kampala, Uganda—for their alleged roles in an international criminal adoption scheme that involved bribe payments to Ugandan officials in exchange for allowing the women to procure adoptions of children in Uganda.[67] The indictment, filed in the Northern District of Ohio, included FCPA charges and alleged that the women corruptly procured the adoptions of children from Uganda by bribing Ugandan judges and officials in exchange for orders permitting the women and their clients to bring the children to the United States for adoption, including the adoption of children who were not properly determined to be orphaned and who had to be ultimately returned to their birth parents.[68] The co-conspirators and the entities they worked for received more than $900,000 in connection with these adoptions. In October 2019, another individual—Robin Longoria—cooperated with the DOJ and pleaded guilty to one count of conspiracy to violate the FCPA, one count of conspiracy to commit wire fraud, and one count of conspiracy to commit visa fraud in connection with her role in this same scheme.[69]

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66 *See* Press Release, Dep't of Just., Oil Trader Indicted in International Bribery and Money Laundering Conspiracy Involving Corrupt Payments to Ecuadorian Officials (Sept. 22, 2020), https://www.justice.gov/opa/pr/oil-trader-indicted-international-bribery-and-money-laundering-conspiracy-involving-corrupt; *see also* Patricia Hurtado & Robert Tuttle, *Ex-Vitol Oil Trader Indicted in U.S. Probe of Ecuador Bribes*, BLOOMBERG (Sept. 22, 2020), https://www.bloomberg.com/news/articles/2020-09-22/florida-asphalt-company-pleads-guilty-in-foreign-bribery-case.

67 *See* Indictment, *United States* v. *Cole, et al.*, No. 20-cr-424-SO (N. D. Ohio Aug. 13, 2020), https://www.justice.gov/opa/press-release/file/1305221/download; Press Release, Dep't of Just., Three Individuals Charged with Arranging Adoptions from Uganda and Poland Through Bribery and Fraud (Aug. 17, 2020), https://www.justice.gov/opa/pr/three-individuals-charged-arranging-adoptions-uganda-and-poland-through-bribery-and-fraud.

68 The indictment includes charges against a third person, Margaret Cole, who was the executive director and founder of the Ohio-based adoption agency that facilitated intercountry adoptions from Uganda and elsewhere for prospective adoptive parents in the U.S. Cole was charged as part of a separate alleged scheme in Poland that did not implicate the FCPA.

69 *See* Plea Agreement, *United States* v. *Longoria*, No. 1:19-cr-482-CAB (N.D. Ohio Oct. 9, 2019); Press Release, Dep't of Just., Texas Woman Pleads Guilty to Conspiracy to Facilitate Adoptions From Uganda Through Bribery and Fraud (Aug. 29, 2019), https://www.justice.gov/opa/pr/texas-woman-pleads-guilty-conspiracy-facilitate-adoptions-uganda-through-bribery-andfraud.

As discussed above, FCPA charges and guilty pleas were unsealed for four individuals in connection with the Sargeant Marine Inc. investigation.

In addition, two individuals were sentenced in connection to FCPA convictions in 2019. On July 20, Edward Thiessen, the former Indonesia Country President for Alstom S.A., the French multinational company, was sentenced to time served and ordered to pay $15,000 for his role in a scheme to win a $118 million energy contract in Indonesia for Alstom Power Inc., Alstom S.A.'s Connecticut-based subsidiary.[70] And on August 4, Zwi Skornicki, a consultant who pleaded guilty in 2019 to conspiracy to violate the FCPA for his role in connection with a scheme to pay bribes on behalf of oil-services companies TechnipFMC PLC and Keppel Offshore & Marine Ltd. to secure business with Petrobras, was sentenced to 18 months of probation and ordered to pay a $50,000 fine.[71]

Conclusion

Although 2020 has presented unique challenges to international anti-corruption investigations, the enforcement activity of the DOJ and the SEC in the third quarter of 2020 may substantiate senior officials' statements that, despite the pandemic, the DOJ and SEC are "still able to work with foreign authorities"[72] and FCPA resolutions "remain[] a priority."[73] Of note, however, it remains to be seen what the long-term impact of the pandemic will be on new investigations.

We will watch these developments with interest and look forward to providing you with further updates.

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70 *See United States* v. *Edward Thiessen*, No. 19-cr-181 (D. Conn. July 20, 2020).

71 *See United States of America* v. *Zwi Skornicki*, No. 19-cr-277 (E.D.N.Y. Aug. 4, 2020).

72 *See* Clara Hudson, *Pandemic Poses Challenges for Building Relationships Abroad, US Enforcers Say*, GLOB. INVESTIGATIONS REV. (July 15, 2020) (quoting Daniel Kahn, Acting Chief, Dep't of Just. Crim. Div. Fraud Sec.), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-32nd-annual-aba-national-institute.

73 *See* Ines Kagubare, *Acting Criminal Division Chief Expects More FCPA Resolutions in Coming Months*, GLOB. INVESTIGATIONS REV. (July 14, 2020) (quoting Brian Rabbitt, Acting Assistant Att'y Gen., Dep't of Just. Crim. Div.), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-32nd-annual-aba-national-institute.

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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