

GIBSON DUNN

*Challenges in Compliance
and Corporate Governance*

February 23, 2021

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MCLE Certificate Information

Most participants should anticipate receiving their certificate of attendance via email approximately four weeks following the webcast.

Virginia Bar Association members should anticipate receiving their certificate of attendance eight weeks following the webcast.

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2020: The Highlights

2020: The Highlights

- Impact of COVID-19
- Expanding State Privacy Protections
- Cyber Threats and Response
- Continuing Gatekeeper Accountability
- Supreme Court Developments

Impact of COVID-19

Prioritizing COVID-Related Fraud Enforcement Actions

- The **Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)** is the largest emergency stimulus package in history, with \$2.2 trillion in government funds.
 - The CARES Act created a Pandemic Response Accountability Committee (“PRAC”) and Special Inspector General for Pandemic Recovery (“SIGPR”), which is empowered to conduct audits and investigations into CARES relief programs.
- DOJ has engaged in a national, coordinated effort to combat illegal conduct by those attempting to defraud healthcare providers and government agencies during the COVID-19 pandemic, particularly involving CARES Act funds.
 - DOJ has quickly prosecuted fraud cases involving COVID-related fraud schemes in the first few months of the pandemic, and more complex enforcement actions are on the horizon.
 - On January 12, 2021, the U.S. Attorney’s Office for the Eastern District of California announced the nation’s first civil settlement for CARES Act-related fraud. An internet retail company and its president and CEO agreed to pay \$100,000 to resolve allegations that it falsely stated it was not in bankruptcy to influence banks to approve, and the SBA to guarantee, a \$350,000 PPP loan.
 - We can expect many more COVID-related fraud cases to follow.

Impact of COVID-19

Misleading Disclosure Enforcement Actions

- The SEC's Division of Enforcement formed a Coronavirus Steering Committee to oversee the Division's efforts to actively look for COVID-related misconduct.
- On December 4, 2020, the SEC announced its first enforcement action against a public company for misleading disclosures about the impact of the pandemic on its business operations and financial condition.
 - The SEC found the company's March and April 2020 Forms 8-K were materially false and misleading in violation of Section 13(a) of the Exchange Act and Rules 13a-11 and 12b-20, which require issuers to file accurate SEC reports.
 - The company did not disclose a letter to its landlord stating that it was not going to pay rent for April 2020, that it was losing \$6 million in cash per week, and that it had approximately 16 weeks of cash remaining.

Impact of COVID-19

Surge in Remedies Available to Whistleblowers

- The COVID-19 pandemic set the stage for a deluge of misconduct allegations.
 - Factors driving this whistleblowing surge include economic instability, medical and safety concerns, new federal and state programs, and renewed public attention on corporate misconduct.
- Beyond the SEC whistleblower program established by Dodd-Frank, there has been an explosion of new vehicles for whistleblower reports.
 - **DOJ** has urged individuals to report COVID-related fraud schemes.
 - The **Anti-Money Laundering Act of 2020 (“AMLA”)** expanded the AML whistleblower program and increased maximum awards to 30 percent of the amount collected in an enforcement action, compared to a previous maximum of \$150,000.
 - Many **state attorneys general** are focusing on investigating and punishing COVID-related misconduct.
 - Outside the United States, the **EU Directive on Whistleblower Protection** also sets new requirements for whistleblower protections in 2021.



Expanding State Privacy Protections

- Last year, California voters approved the **California Privacy Rights Act of 2020 (“CPRA”)**.
 - The CPRA modifies and expands on privacy protections provided by the California Consumer Privacy Act, allowing California consumers to limit the use and disclosure of their information.
 - The CPRA creates the California Privacy Protection Agency and empowers it to enforce the CPRA.
- The California Attorney General’s Office is poised to become an even larger presence in the privacy landscape.
 - In September 2020, the Office entered into an \$8+ million settlement with a health insurance provider to resolve alleged consumer privacy violations stemming from a 2014 data breach.
 - The Office also secured a settlement with app developer Glow related to security concerns over its app’s ability to protect users’ personal information.
- California’s increased focus on consumer privacy may signal a growing trend among the states to provide similar protections.
 - New York Governor Andrew Cuomo’s 2022 budget proposes a comprehensive data privacy bill.

Cyber Threats and Response

- The unprecedented number of cyberattacks in 2020 highlighted vulnerabilities in both the private and public sectors.
 - Some of the world’s largest businesses experienced data breaches in 2020, many of which spawned class action or shareholder derivative litigation.
 - The COVID-19 pandemic presented new challenges, including as the work-from-home environment made companies more vulnerable to data breaches.
 - Cyber threats will continue to have a significant impact on corporate compliance efforts in 2021 and beyond.
- We anticipate cybersecurity to be a top priority in the Biden Administration, and compliance officers should pay close attention to anticipated shifts in the regulatory environment.
 - Momentum also is building among states to craft increasingly stringent data privacy and breach notification laws.

“We’ve elevated the status of cyber issues within our government, including appointing the first ... Deputy National Security Advisor for Cyber and Emerging Technology. We’re launching an urgent initiative to improve our capability, readiness, and resilience in cyberspace.”

– President Joseph R. Biden
(Feb. 4, 2021)

Continuing Gatekeeper Accountability

- Authorities continue to hold compliance officers and other gatekeepers responsible when they:
 - Engage directly in wrongdoing;
 - Attempt to cover up wrongdoing;
 - Cross clearly established lines or professional standards; and/or
 - Fail to meaningfully implement compliance programs for which they are directly responsible.
- Indicia of good faith and reasonable inquiry are highly important in determining whether to second-guess a gatekeeper’s decision.

SEC Opinion in re Thaddeus North (Oct. 29, 2018) (upheld by D.C. Circuit, Oct. 23, 2020):

“[I]t is clear that [the CCO] North failed to make reasonable efforts to fulfill the responsibilities of his position ... Here, North ignored red flags and repeatedly failed to perform compliance functions for which he was directly responsible.”

OCC Notice of Charges against Wells Fargo (Jan. 3, 2020):

“[Respondents] had a responsibility to ensure incentive compensation plans were designed and operated in accordance with Bank policy ... [and to] advise whether the Community Bank was operating in conformance with laws and regulations.” “None of the Respondents ... adequately performed their responsibilities.”

Supreme Court Developments

- Following the September 2020 death of Justice Ruth Bader Ginsburg, Justice Amy Coney Barrett was appointed and confirmed to the Supreme Court, solidifying a conservative majority.
- In an 8-1 decision in *Liu v. SEC*, the Supreme Court upheld the SEC's authority to seek disgorgement in civil actions as a form of equitable relief, but limited the amount of disgorgement to the defendants' net profits from the wrongdoing (after deducting legitimate expenses) and concluded that disgorgement must be assessed at least partially for the victims' benefit.
- In *Kelly v. United States*, the Supreme Court reversed the convictions of two aides to former Governor Chris Christie related to a scheme to close traffic lanes on the George Washington Bridge to punish a political rival. In a unanimous opinion, the Supreme Court held that the two aides could not have violated either the federal wire fraud or the federal program fraud statutes because the scheme was not intended to obtain any money or property.
- The Supreme Court heard oral argument in *Ford Motor Company v. Montana Eighth Judicial District Court* and is considering whether a Montana court could exercise specific personal jurisdiction over Ford in a lawsuit relating to a Montana car accident in which the vehicle was manufactured and sold outside of Montana. The outcome will have potentially broad implications regarding the jurisdictions where corporations can be sued.

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Looking Ahead: The Biden Administration

Looking Ahead: The Biden Administration

- The Presidential Transition
- Consumer Financial Protection
- Tension between Data Privacy & Competition Law
- Increasing Demands for ESG Disclosures
- Focus on Racial Justice and Equity Issues

The Presidential Transition

- President Biden's Administration brings a potential shift from President Trump's deregulatory priorities and a new focus on COVID-19, racial equity, climate change, and the economy.
- With a closely divided Congress, bipartisanship in the House and Senate will be critical to achieving legislative movement.
- We anticipate ramped-up legislation, regulation, and enforcement.
 - President Biden has indicated that revitalizing U.S. financial agencies and pursuing more aggressive enforcement will be a major focus of his policy agenda.
 - The CFPB will take a more aggressive approach to enforcement.
 - The Biden Administration announced a whole-of-government approach to controlling the COVID-19 pandemic, providing economic relief, tackling climate change, and advancing racial equity and civil rights.

THE BIDEN-HARRIS ADMINISTRATION IMMEDIATE PRIORITIES

President Biden will deliver bold action and immediate relief for American families as the country grapples with converging crises. This will include actions to control the COVID-19 pandemic, provide economic relief, tackle climate change, and advance racial equity and civil rights, as well as immediate actions to reform our immigration system and restore America's standing in the world.

COVID-19

President Biden will move quickly to contain the COVID-19 crisis by expanding testing, safely reopening schools and businesses, and taking science-driven steps to address the communities – especially communities of color – who have been hardest hit by this virus. And, President Biden will launch a national vaccination program to inoculate the U.S. population efficiently and equitably.

[Read more about the Biden-Harris plan to beat COVID-19](#)

CLIMATE

President Biden will take swift action to tackle the climate emergency. The Biden Administration will ensure we meet the demands of science, while empowering American workers and businesses to lead a clean energy revolution.

RACIAL EQUITY

The promise of our nation is that every American has an equal chance to get ahead, yet persistent systemic racism and barriers to opportunity have denied this promise for so many. President Biden is putting equity at the center of the agenda with a whole of government approach to embed racial justice across Federal agencies, policies, and programs. And President Biden will take bold action to advance a comprehensive equity agenda to deliver criminal justice reform, end disparities in healthcare access and education, strengthen fair housing, and restore Federal respect for Tribal sovereignty, among other actions, so that everyone across America has the opportunity to fulfill their potential.

Consumer Financial Protection

- Consumer financial protection will be an immediate priority for the Biden Administration, particularly with COVID-19's economic impact looming large.
- We expect a particularly drastic shift will occur at the CFPB.
 - Former CFPB director Kathy Kraninger stepped down at President Biden's request, and Dave Uejio took over as the CFPB's acting director.
 - President Biden has nominated current FTC Commissioner Rohit Chopra to serve as the permanent CFPB director.
- We anticipate a ramp-up in the frequency and scale of enforcement actions, with more investigations and actions—and heftier fines—against a broader range of financial firms.
 - Enforcement of the CARES Act will be a top priority, with aggressive monitoring of banks and financial institutions.
 - The CFPB will partner closely with state attorneys general on pandemic-related issues, including predatory lending and fraud allegations.



Tension between Data Privacy & Competition Law

- Data privacy will be a key area of legislative and enforcement focus for Congress and the Biden Administration, but a robust data privacy agenda could have ripple effects on competition.
- Policymakers on both sides of the aisle have recognized the need for federal privacy legislation, despite disagreement on key details. Potential legislation includes:
 - Section 230 Reform:** There is some bipartisan support for reforming Section 230 of the Communications Decency Act, although there is significant disagreement about how to do so.
 - Comprehensive Federal Privacy Law:** With Democrats in control of the legislative and executive branches, the key question is whether comprehensive federal privacy legislation actually will pass.
- Increased regulation can make it harder for smaller companies to enter and compete in the market. The Biden Administration will need to balance the burdens of increased privacy regulations with concerns about increased market concentration.
 - Competition and Antitrust Law Enforcement Reform Act:** Senator Amy Klobuchar introduced sweeping legislation that would increase enforcement resources, strengthen prohibitions against anti-competitive mergers, and implement other reforms to enhance antitrust enforcement. Democrats would need bipartisan support to amend antitrust laws.

Increasing Demands for ESG Disclosures

- The institutional investor community is increasingly forceful in demanding disclosures on climate change and racial equity. With a Democratic majority in the near term, we expect the SEC to adopt regulatory changes regarding environmental, social, and governance (“ESG”) initiatives.
- Companies are facing increasing demands from investors, proxy advisory firms, and ratings firms for greater and more detailed disclosure on ESG topics.
 - To Date, Private Ordering:** In 2019, 90% of the S&P 500 published sustainability reports, using different disclosure frameworks, such as the Global Reporting Initiative, Sustainability Accounting Standards Board, and Task Force on Climate-Related Financial Disclosures.
 - Responding to Shareholder Proposals and Large Institutional Shareholders:** In Larry Fink’s 2021 Letter to CEOs, BlackRock asks companies to disclose a plan for how their business model will be compatible with a net zero economy.
 - New SEC Rulemaking Could Require Uniform, Comparable Disclosure:** New SEC rulemaking could require all companies to disclose the same information regarding ESG, diversity, and inclusion. Two Commissioners have expressed support for this approach.
- Calls for enhanced disclosures also are driving a need for governance structures, practices, and policies to evolve in tandem.

Focus on Racial Justice and Equity Issues

- The Biden Administration is making unprecedented efforts to elevate issues of racial justice and equity in a whole-of-government approach.
- The Biden Administration seeks to embed its racial equity initiatives in every aspect of the government.
 - Ambassador Susan Rice will lead the charge on racial justice and equity by coordinating efforts to embed equity principles in every agency.
 - The OMB is tasked with determining whether “agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals.”
 - Each agency is required to report to Ambassador Rice within 200 days to review its programs, report on systemic barriers, and deliver an action plan.
- President Biden’s early racial equity initiatives included four executive orders addressing fair housing, ending the DOJ’s use of private prisons, reaffirming tribal sovereignty, and fighting xenophobia against Asian Americans and Pacific Islanders.

“[W]e need to make the issue of racial equity not just an issue for any one department of government; it has to be the business of the whole of government.”

– President Joseph R. Biden
(Jan. 26, 2021)

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Global Enforcement and Regulatory Developments

Global Enforcement and Regulatory Developments

- Sanctions
- Data Privacy and Security
- Corporate Governance
- White Collar and Securities Fraud
- Antitrust
- False Claims Act
- BSA/AML

Sanctions

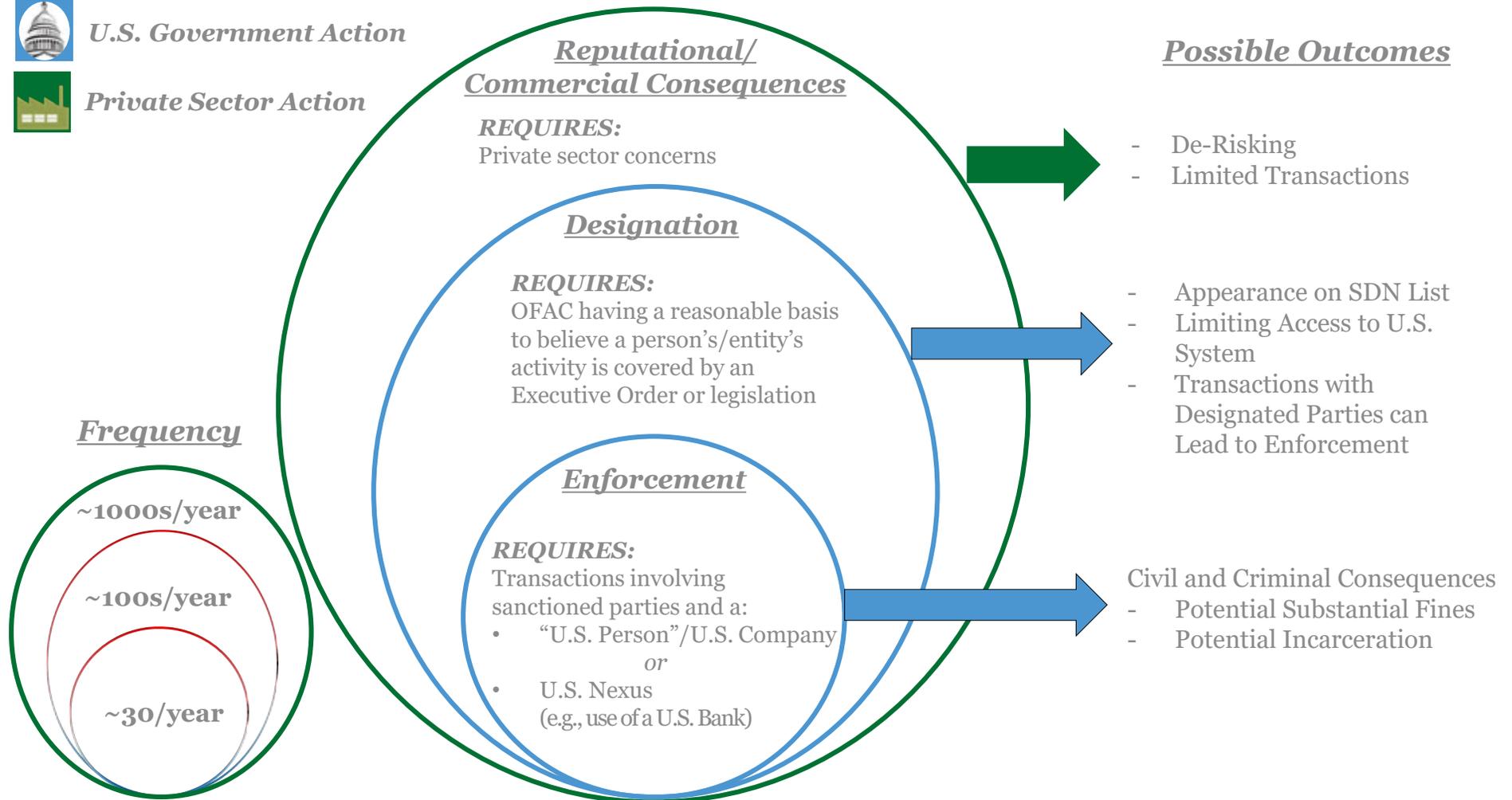
Overview of Sanctions Risks



U.S. Government Action



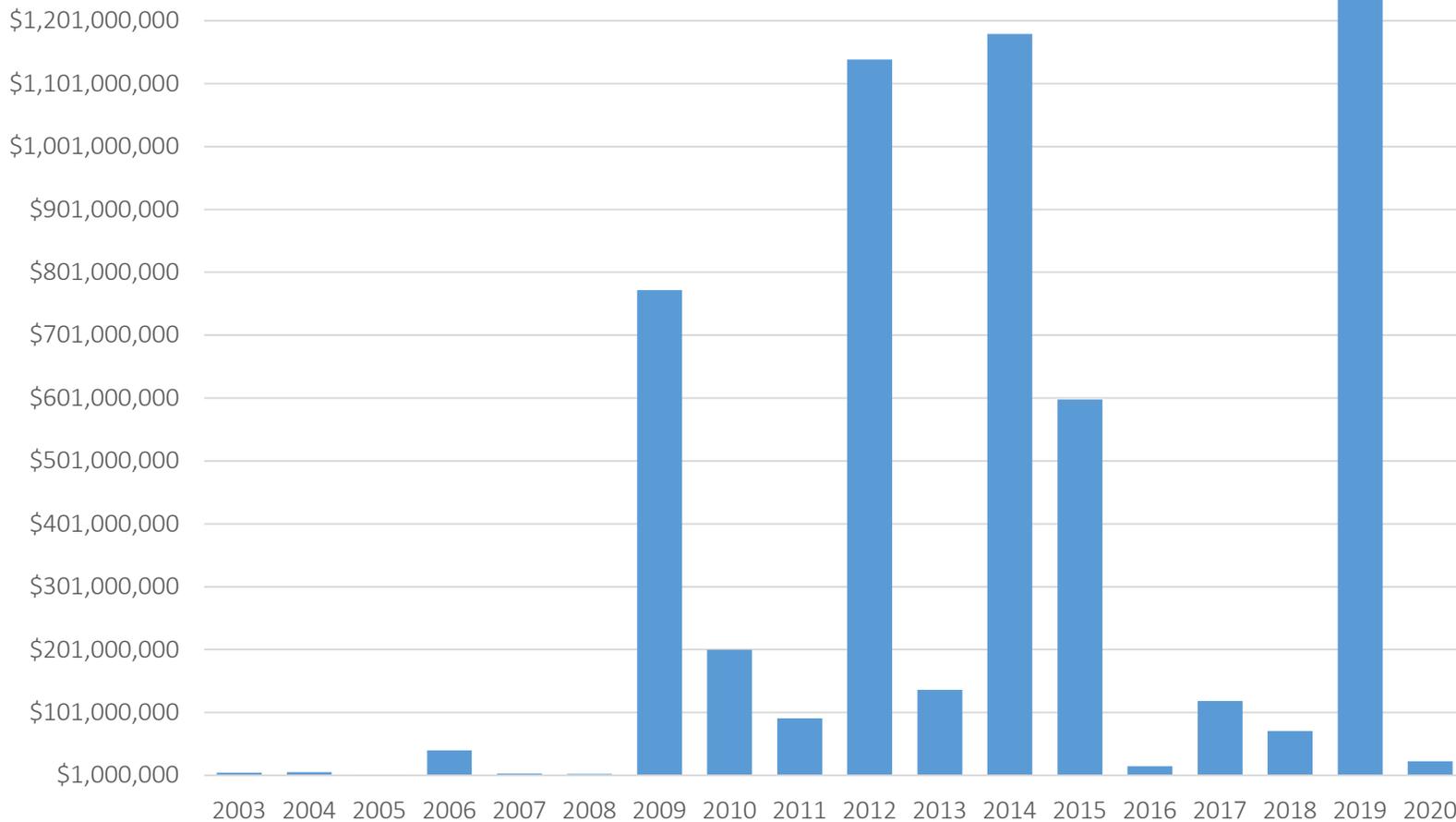
Private Sector Action



Sanctions

U.S. Update: 2020 By the Numbers

Total OFAC Penalties by Year



OFAC Penalties

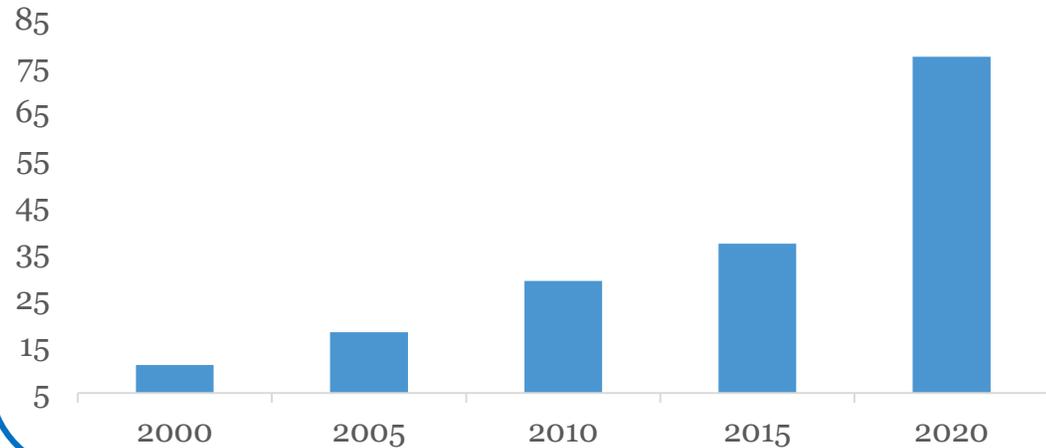
- 2020 civil penalties have fallen to their lowest level since 2016, and are down drastically compared to 2019's record year of OFAC enforcement.
- OFAC took 16 enforcement actions in 2020, down from 2019.

Sanctions

U.S. Update: An Ever-Expanding Footprint for U.S. Sanctions

- The United States continues to rely on economic sanctions as a primary (and bipartisan) tool of diplomacy and national security.
- New programs have been instituted very quickly, blacklisted entities have been added and removed at an unprecedented pace, and the number and severity of enforcement actions—at both the federal and state levels—have increased remarkably.
- The Trump Administration was particularly aggressive in its use of sanctions, averaging two times more additions to the SDN list compared with the Bush and Obama administrations.

Active OFAC Sanctions Programs



60%

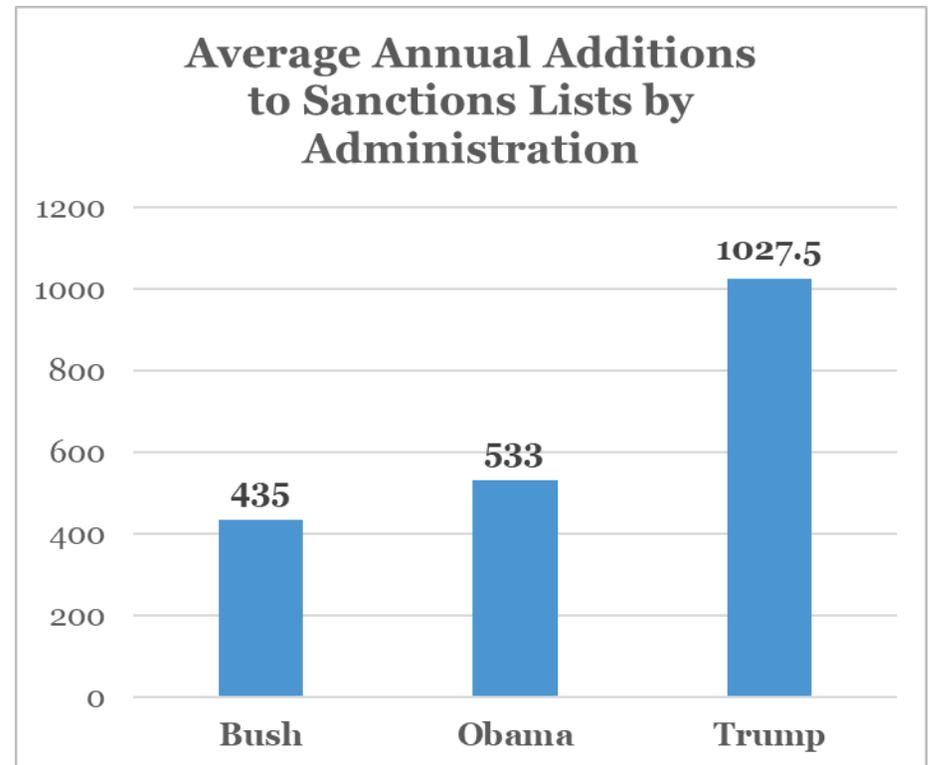
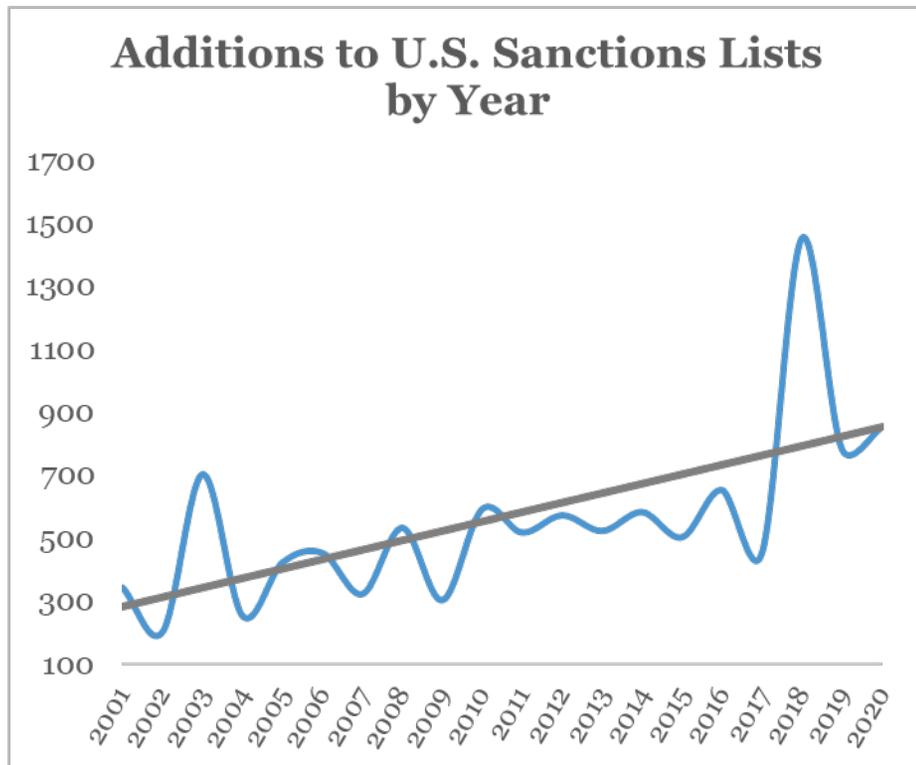
Increase since 2009 in the number of individuals and entities on the SDN blacklist.

1000s

Annual changes to the SDN list, including additions, subtractions, and clarifications. On an annual basis, the average rate of change has almost doubled since 2007.

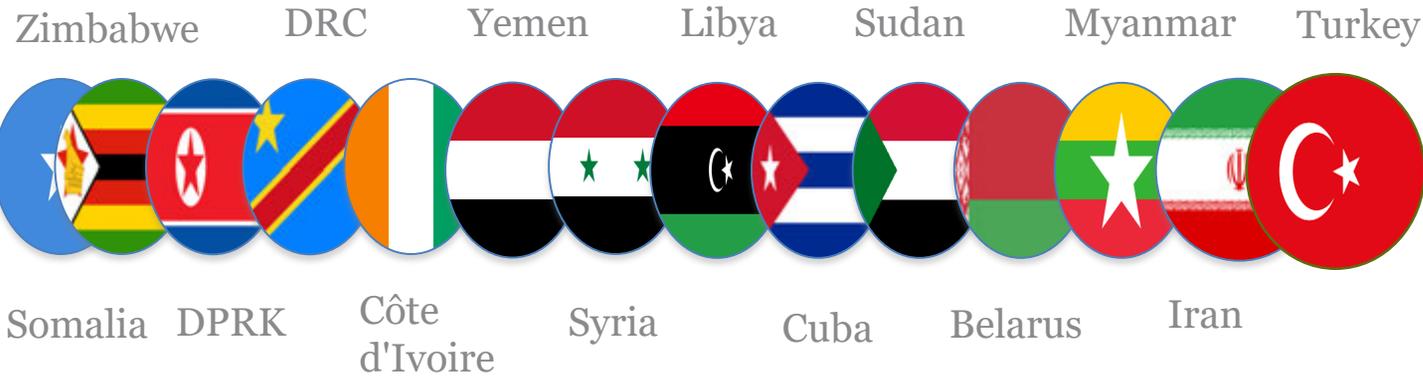
Sanctions

U.S. Update: An Ever-Expanding Footprint for U.S. Sanctions



Sanctions

U.S. Update: Growing Size and Economic Importance of Targets



Total: \$3.3 trillion



**Russia:
\$3.6
trillion**

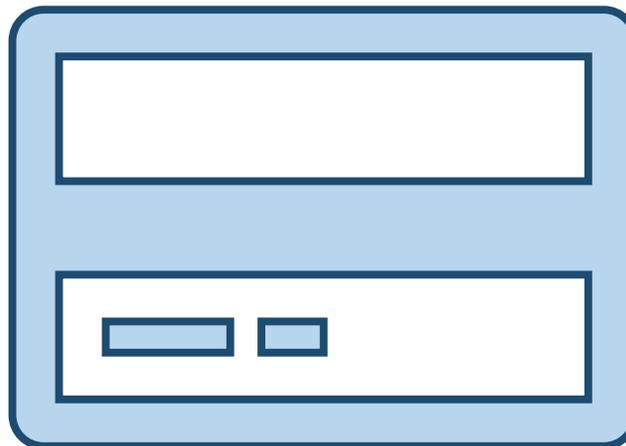


**China:
\$23.1
trillion**

Sanctions

U.S. Update: 2020 Enforcement Developments and Trends

- **Deficiencies in Automated Screening Systems:** In recent years, OFAC consistently has brought enforcement actions against companies for sanctions violations resulting from the failure of companies' automated screening systems to detect transactions involving SDNs or other prohibited parties.
 - In April 2020, OFAC brought an action against American Express Travel Related Services for allegedly issuing a prepaid card to and processing 41 transactions on behalf of an SDN due to an error in Amex's screening software, allowing the transactions to be processed despite initially being flagged and denied.



Sanctions

U.S. Update: Limits on the Executive's Sanctions Power

- **TikTok, WeChat, and ByteDance:** In August, then-President Trump announced that the Commerce Department would impose restrictions on transactions related to the Chinese-owned apps TikTok and WeChat, and that he would require ByteDance to divest its ownership of TikTok. Before the restrictions could take effect, federal judges in three cases blocked their implementation, determining that he may have overstepped his authority or violated users' First Amendment rights.
 - In February 2021, as part of a broader review of the Treasury Department's sanctions operations, the Biden Administration asked the Ninth Circuit Court of Appeals to pause the WeChat litigation and requested a similar delay in the TikTok-related D.D.C. court case.
- **The ICC Executive Order (“EO”):** On January 4, in another legal broadside against sanctions, S.D.N.Y. Judge Failla issued a preliminary injunction against OFAC with respect to enforcing the ICC EO (through which OFAC imposed sanctions against the ICC prosecutor and one of her deputies).
 - The order enjoins OFAC from enforcing the civil or criminal penalties under the EO.
- These cases suggest a rare restriction on the President's expansive sanctions authority.
 - The decisions—all of which remain subject to appeal—demonstrate the development of a jurisprudence providing greater clarity than ever concerning the limits on the sanctions authority of the executive branch, especially in the context of First Amendment restrictions.

Sanctions

U.S. Whole-of-Government Approach to China



- Under the whole-of-government approach, various U.S. federal government entities created initiatives affecting trade with China. Some key recent developments include:
 - **Congress** passed two laws this past summer targeting persons involved in human rights violations in Hong Kong and the Xinjiang Uyghur Autonomous Region.
 - The **Department of State** imposed visa restrictions on individuals connected to human rights violations in Xinjiang and Hong Kong and announced other policy changes related to Hong Kong.
 - EO 13953 instructed the **Department of the Interior** to take action to increase the domestic supply of rare earth elements in order to reduce U.S. dependence on China for “critical minerals.”
 - The **Department of the Treasury**, through OFAC, designated several individuals for alleged human rights abuses in Xinjiang and Hong Kong, issued the Xinjiang supply chain advisory, and, starting in January 2021, implemented EO 13959, restricting the ability of U.S. persons to invest in the securities of identified “Communist Chinese Military Companies.”
 - The **Department of Commerce’s** Bureau of Industry and Security (“BIS”) announced several China-related changes, including creating a Huawei-specific Direct Product Rule, adding 24 Chinese companies to the Entity List, expanding BIS’s ability to review license applications for human rights concerns, and expanding BIS’s licensing policy for reviewing crime control items.
 - The **Department of Justice** has stated that cases arising out of China are an enforcement priority.

Sanctions

Myanmar: Key Developments



- On February 11, 2021, the Biden Administration authorized new sanctions and imposed new export-control restrictions in response to the rapidly developing situation in Myanmar following the military overthrow of the country’s democratically elected government.
- OFAC designated ten individuals and three business entities associated with Myanmar’s military.
 - Many of these designees are linked to Myanmar Economic Holdings Limited (“MEHL”). However, the Biden Administration did not designate MEHL or the Myanmar Economic Corporation.
- **Ramifications for Operating in Myanmar:** Under OFAC’s Fifty Percent Rule and other OFAC guidance, the fact that a sanctioned individual is the head of a Myanmar government agency or on a Myanmar company’s board of directors does not result in the automatic designation of that agency or company without majority ownership by designated parties.
 - Those operating in Myanmar should look to OFAC’s designation of 11 senior Hong Kong and mainland Chinese government officials and take similar precautions when dealing with any government agencies or companies affiliated with the newly designated parties in Myanmar.
- **Export Controls Imposed:** The Commerce Department’s BIS announced that it would apply a “presumption of denial,” effective immediately, for items requiring a license for export and reexport to Myanmar’s Ministry of Defense, Ministry of Home Affairs, armed forces, and security services.
 - In addition, BIS announced a suspension of certain previously issued licenses to these departments and agencies, and of certain license exemptions previously available to Myanmar as a result of its Country Group status under the Export Administration Regulations.

Sanctions

Sanctions Under the New Administration

Multilateralism

- Sanctions will remain a core instrument of U.S. foreign policy
- Supplementation of sanctions with additional emphasis on diplomacy
- Renewed coordination with traditional allies

Recalibrating Sanctions

- Evaluation leading to removal or narrowing of some Trump Administration sanctions under certain conditions
- Potential removal of sanctions (e.g., of ICC officials) inconsistent with commitment to multilateral institutions
- Management of counter-sanctions from states including China, Russia, and the EU

China

- Broad, bipartisan support for pressure on Beijing; limited cooperation in some areas
- Relaxing Trump-era measures likely will require concessions
- Sustained focus on human rights in Xinjiang and Hong Kong

Iran

- Potential rejoining of Joint Comprehensive Plan of Action (“JCPOA”)
- Counter-terrorism sanctions may be challenging to reverse
- Limited constituency for easing pressure on Tehran

Sanctions

U.S. Sanctions: What's Next?

Cuba

- Possible return to Obama-era sanctions relief
- Waiver of Title III of Helms-Burton Act
- Act of Congress required to lift most Cuba sanctions

Russia

- Bipartisan support for tough approach to Russia; potential for additional sanctions
- Condemnation of Russian actions; focus on human rights and democracy
- Broader strategy for Western opposition to Russian policies

Venezuela

- Potential narrowing of sanctions to reduce humanitarian crisis in the country
- Focus on multilateral diplomatic solutions to crisis
- Continuation of substantial criminal prosecution of regime government officials

Sanctions

International 2020 Developments and Trends



- 2019 was the second-highest year in history for fines, with \$8.4 billion reportedly levied against global financial institutions. By the end of July 2020, reported penalties against global financial institutions in 2020 had totaled \$5.6 billion for AML-related offenses.



Sanctions-Related Penalties in Germany:

- A Russian citizen received a sanctions-related seven-year sentence for violating European sanctions by selling sensitive dual-use technology worth more than €1.83 million to Russians with military backgrounds between 2014 and 2018.
- In another trial, which is still in progress, the accused is alleged to have supplied dual-use goods to a Russian military end user from 2016 to 2018. The required export licenses allegedly were obtained fraudulently by providing incorrect information on the machines' intended use.

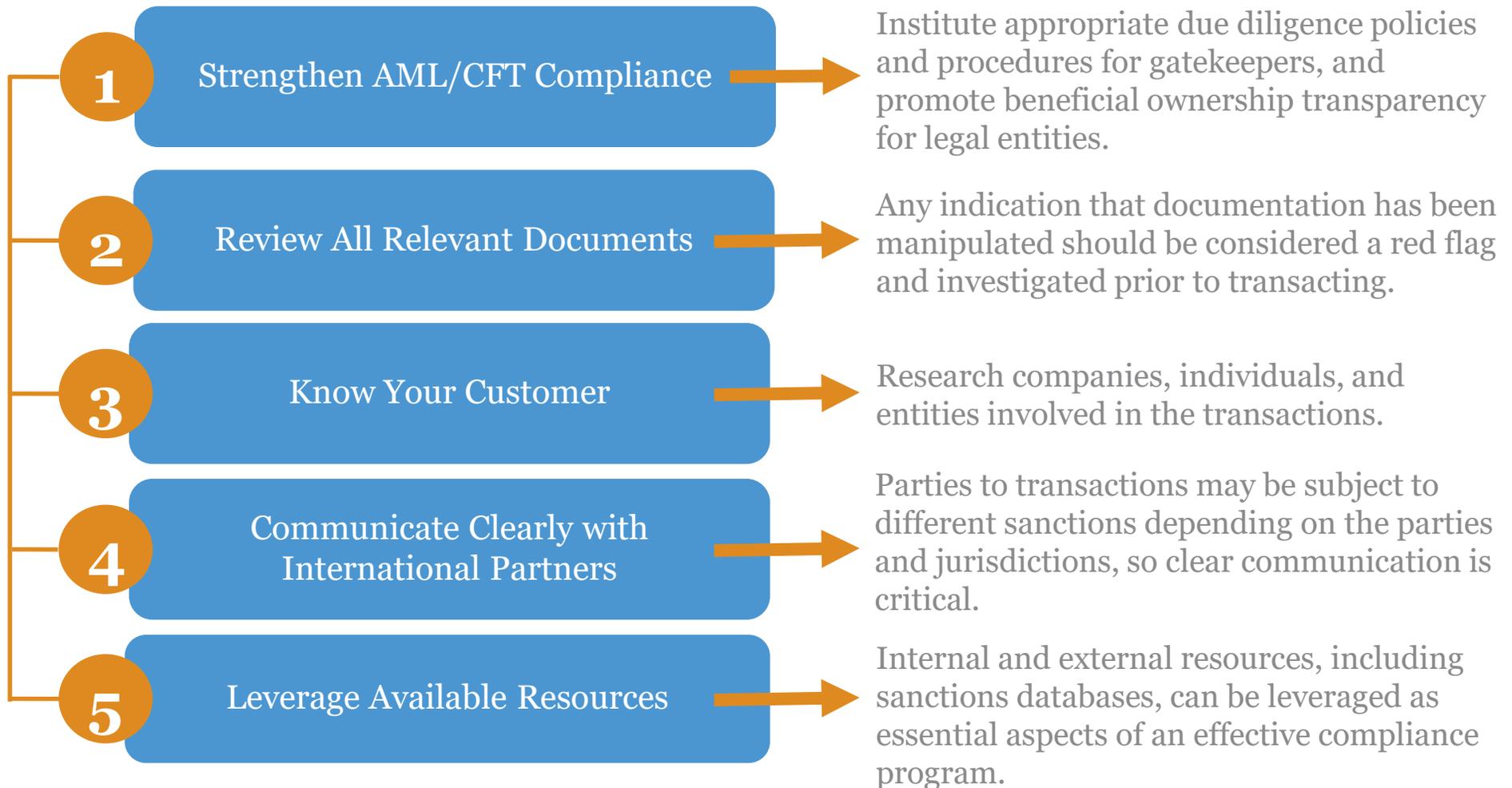


Sanctions-Related Accusation in Denmark:

- Charges have been brought against a Danish holding company and its director for allegedly selling jet fuel worth €87 million to Russian companies that transported the fuel to Syria, a violation of the EU's prohibition on "the sale, supply, transfer or export of jet fuel and fuel additives to persons, entities or bodies in Syria or for use in Syria."

Sanctions

Now What? Sanctions Compliance Best Practices

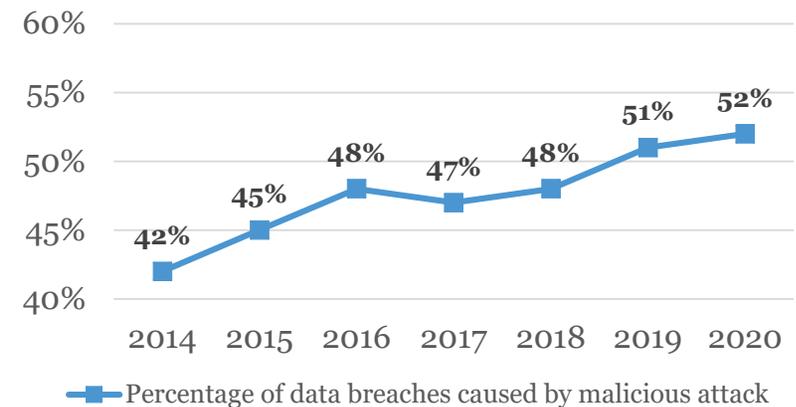


Data Privacy and Security

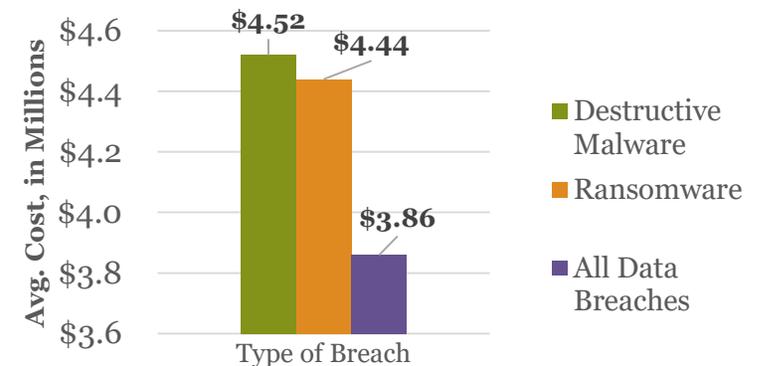
Threats and Trends

- Malicious attacks, including those carried out by nation-states, hacktivists, or financially motivated criminals, accounted for 52% of data breaches in 2020, and can be among the more costly types of data breaches.
 - Notable nation-state attacks include the December 2020 disclosure by a cyber-security firm that state-sponsored attackers had compromised network monitoring software used by 18,000 customers.
- Shifts to online and remote interactions due to COVID-19 led to a reported 30,000% increase in phishing emails, ransomware, and malicious websites from January to May 2020.
 - 76% of organizations implementing remote work protocols related to COVID-19 anticipated that remote work would increase data breach response and containment time.
- Experts predict ransomware and spear phishing attacks will continue in 2021, with attackers particularly focused on small- to mid-size entities, healthcare, and education.

Continued Increase in Share of Data Breaches Caused by Malicious Attack



Malware & Ransomware Attacks Are More Expensive, on Average, Than Other Breaches



Data compiled from Ponemon Institute – 2020 Cost of Data Breach Study

Data Privacy and Security

Regulatory and Enforcement Developments: State Activities

- State attorneys general netted several significant data breach and cyberattack settlements in 2020, with New York and California remaining in the vanguard.

–The California AG’s enforcement authority for the California Consumer Privacy Act (“CCPA”) became effective on July 1, 2020; AG Becerra’s office announced that it has begun sending letters to companies that may be in violation.

–In November 2020, California voters passed the California Privacy Rights Act, which will become effective in 2023 and will create a new data privacy enforcement agency.

–In July 2020, the New York State Department of Financial Services announced its first-ever cybersecurity enforcement action, against a title insurance company that allegedly exposed customer data through a vulnerability on a public-facing website.

Nearly \$100M in Major State AG Data Breach Settlements in 2020

Amount	Industry	Details
\$39.5M	Healthcare	Settlement with AGs from 42 states and D.C. for alleged violations of state laws and HIPPA following 2015 cyberattack
\$37.7M	Credit Reporting	\$19.5M settlement with Indiana AG and \$18.2M settlement with Massachusetts AG related to customer information data breach; Indiana & Massachusetts opted out of \$175M 2019 settlement with 48 states and D.C.
\$17.5M	Retail	Settlement with AGs from 46 states and D.C., resolving claims arising from 2014 customer payment information data breach
\$2.4M	Hospitality	Settlement with 27 AGs, alleging failure to follow state data breach notification and data security laws in connection with 2017 breach
\$2M	Online Retail	Seven state AGs alleged failure to adequately respond to customer information data breach; \$1.25M of settlement suspended due to company’s financial condition

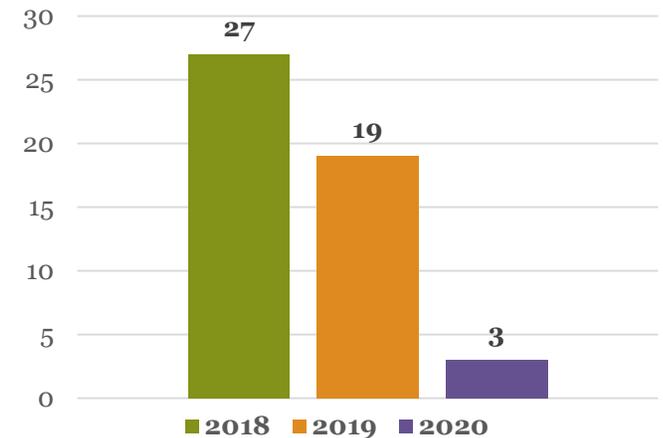


Data Privacy and Security

Litigation and Enforcement Developments: Gatekeeper Liability

- Board members and corporate executives continued to be targets of litigation following cybersecurity incidents.
 - This issue cut across industries, with companies facing lawsuits in 2020 seeking to impose liability on officers and directors for losses associated with data breaches or cyber attacks.
 - However, the overall number of securities lawsuits against directors and officers arising from data breaches or cyber incidents appeared to decrease in 2020.
- Cyber-insurance claims have risen dramatically, with one insurer reporting a 950% rise in claims from 2016 to 2019. In parallel, the market for purchasing D&O liability insurance hardened in 2020, with experts observing that data breaches are a source of liability risk for directors and officers.
- In August 2020, DOJ took the seemingly unprecedented step of bringing federal criminal charges against an executive-level in-house attorney at a technology company for allegedly failing to report a cyberattack to federal regulators investigating an earlier data breach.

Approx. Number of New D&O Data Breach/Cyber Incident Securities Lawsuits, by Year



Data Privacy and Security

Litigation Developments: California Consumer Privacy Act & Illinois Biometric Information Privacy Act

- Plaintiffs began to take advantage of the private right of action in the CCPA following its January 2020 effective date, with approximately 50 cases in litigation by the end of 2020.
 - Pending issues include retroactive application of the CCPA, the scope of the CCPA private right of action, and when businesses can cut off a CCPA claim by curing the underlying violation.
 - In late December 2020, a federal court granted preliminary approval of the first CCPA settlement in litigation between clothing retailer Hanna Andersson and a putative class of customers alleging their information was exposed due to a security breach.
 - The settlement requires the establishment of a fund for affected consumers and the implementation of new security measures, including hiring a cybersecurity director, conducting a risk assessment, using multi-factor authentication for cloud services, and conducting enterprise-wide phishing and penetration testing.
- Litigation under the Illinois Biometric Information Privacy Act (“BIPA”) is expected to grow in 2021 following a major year in 2020, including two Seventh Circuit decisions making clear that certain BIPA claims can be brought in federal court.
 - Companies collecting biometric data or developing biometric tools for purposes related to COVID-19—such as facial scans to detect mask wearing, or photographs for contact tracing—should assess compliance risks with BIPA and other state laws, including the CCPA.

Data Privacy and Security

UK and European Developments

- **U.S.-EU Privacy Shield:** On July 16, 2020, the EU Court of Justice struck down the U.S.-EU Privacy Shield, previously used by many companies to facilitate personal data transfers from the EU to the United States, but ruled that Standard Contractual Clauses (“SCCs”) approved by the European Commission—another mechanism to justify such transfers—remain valid, with some caveats.
 - Following the ruling, the European Data Protection Board (“EDPB”) advised data processors to evaluate their SCCs and “determine if the guarantees provided by the SCCs ... can be complied with in practice.”
 - In November 2020, the EDPB issued recommendations on adding supplementary measures to transfer tools to provide EU-level personal data protection. The European Commission also published new draft SCCs.
- **EU-UK Trade and Cooperation Agreement:** In December 2020, the EU and UK entered into the EU-UK Trade and Cooperation Agreement, which allows personal data to flow freely to the UK, until “adequacy decisions” have been adopted, for up to six months beginning on January 1, 2021.
 - “Adequacy decisions” are determinations by the EU on whether a country outside the EU offers an adequate level of data protection.

Corporate Governance

Changes in the SEC's Division of Corporation Finance

- **Change in Leadership:** After the retirement of longtime Deputy Director Shelley Parratt, who supervised the Division's disclosure operations (i.e., the staff who review and comment on SEC filings), Harvard Law professor John Coates was appointed as Acting Director.
- **Trump Administration Priorities:** During the Trump Administration, the Division was pro-business and sought to facilitate transactions, including:
 - Being more willing to grant waivers from financial statement requirements in Reg S-X and making the process for doing so easier and less formal;
 - Issuing fewer comments on SEC filings, including IPOs; and
 - Adopting guidance making it easier to exclude shareholder proposals for micro-management.
- **Expected Shift in Priorities:** In the Biden Administration, the Division is expected to focus on new required human capital disclosures and issuers' materiality-based disclosures regarding the impact of climate change. Key questions include:
 - Do principles-based disclosure requirements succeed in getting issuers to disclose tailored information that is relevant and useful to investors and can be compared to peers?
 - To promote stronger compliance with disclosure requirements, will the Division become more active in issuing comments on SEC filings?

Corporate Governance

Ascendancy of ESG Considerations: Environmental

- Large institutional investors have put climate change at the top of their list of engagement priorities in 2021.
 - BlackRock CEO Larry Fink wrote in his 2021 annual letter to CEOs that “people have seen the mounting physical toll” and the “direct financial impact” of climate change, and “no issue ranks higher than climate change on our clients’ lists of priorities.”
 - Nordea Bank Abp, which currently oversees ~\$425 billion, recently announced it may exclude all investments not deemed sustainable in as little as half a decade.
- In 2020, the SEC declined to adopt specific climate change disclosure requirements. In 2010, the SEC issued climate-change interpretive guidance which interpreted how “materiality” applies to climate change fact patterns.
 - Reinforcing the 2010 guidance would give Acting Chair Lee a quick alternative to Commission action. There have been no CorpFin climate change guidance comments since 2014.
- We expect the SEC Staff to closely review climate change disclosures in Form 10-Ks for the year ended December 31, 2020.
- President Biden’s Executive Order on Tackling the Climate Crisis at Home and Abroad states that the “Federal Government must drive assessment, disclosure, and mitigation of climate pollution and climate-related risks in every sector of our economy.”

“I believe that the pandemic has presented such an existential crisis—such a stark reminder of our fragility—that it has driven us to confront the global threat of climate change more forcefully and to consider how, like the pandemic, it will alter our lives.”

– Larry Fink,
BlackRock
Chairman & CEO
(Jan. 26, 2021)

Corporate Governance

Institutional Investor Perspectives on Climate Change

BlackRock

“We asked companies to demonstrate they were adequately managing climate and other sustainability-related risks by reporting in line with the Task Force on Climate-related Financial Disclosures (TCFD) framework and metrics provided in the Sustainability Accounting Standards Board (SASB) standards.” “In our principles, we clarify our expectation that companies disclose a plan for how their business model will be compatible with a low-carbon economy, that is, one where global warming is limited to well below 2 degrees Celsius and consistent with a global aspiration of net zero GHG emissions by 2050.”

- *BlackRock, Our 2021 Stewardship Expectations (December 2020)*

Vanguard

“We expect boards to effectively oversee climate risks and become more transparent about their decision-making process.” “[W]e expect that the company has established a climate-competent board ... [and to] disclose to the market how their board oversees climate-related strategy and risk management.” “We support the framework created by the Task Force on Climate-related Financial Disclosures for disclosing strategy, risk management, governance, metrics, and targets.”

-*Vanguard Investment Stewardship Insights (June 2020)*

State Street

“Since 2018, we have asked all of our portfolio companies to use the TCFD framework and have engaged with boards on climate risk oversight ... In 2021 we will focus on specific companies especially vulnerable to the transition risks of climate change. Further, we will continue our ongoing engagement with companies in other sectors that, while not as carbon intensive, also face risks such as the physical impacts of climate change.”

-*CEO Cyrus Taraporevala’s Letter on 2021 Proxy Voting Agenda (January 2021)*

Corporate Governance

Ascendancy of ESG Considerations: Social

- Human capital has rapidly emerged as a critical focus area for stakeholders—in particular, with respect to workforce diversity.
 - Investors have called for enhanced human capital disclosures related to workforce diversity.
 - Following a campaign this past summer, the New York City Comptroller submitted proposals for the 2021 proxy season seeking disclosure of EEO-1 Report data (other investors have also submitted these proposals).
- In August 2020, the SEC amended its disclosure rules to require, if material to an understanding of the company’s business taken as a whole, “a description of the registrant’s human capital resources.”
 - The amendments do not include any specific human capital reporting framework or define “human capital.” Instead, they use a principles-based approach.
 - The amendments passed with a 3-2 vote, with the two Democratic Commissioners dissenting based in part on the absence of more prescriptive rules requiring disclosures and metrics.

“I would have supported today’s final rule if it had included even minimal expansion on the topic of human capital to include simple, commonly kept metrics such as part time vs. full time workers, workforce expenses, turnover, and diversity.”

– Allison Herren Lee,
SEC Commissioner
(Aug. 26, 2020)

Corporate Governance

Institutional Investor Perspectives on Board and Workforce Diversity

BlackRock

“We are raising our expectations, in the context of regional norms, on board and workforce ethnic and gender diversity.” “In the U.S., we are asking companies to disclose the diversity of their workforce, including demographics such as race, gender, and ethnicity through the disclosure of EEO-1 data, as well as the actions they are taking to advance DEI [diversity, equity and inclusion] and support an engaged workforce.”

-BlackRock, Our 2021 Stewardship Expectations (December 2020)

Vanguard

“Beginning at 2021 annual meetings, the Vanguard funds may vote against directors at companies where progress on board diversity falls behind market norms and expectations.” “Vanguard’s views on diversity extend beyond the boardroom to leadership teams and workforces.” “We look for companies to publish policies on employee recruitment, retention, and inclusion. We expect them to outline the steps the board is taking to ensure that employees feel they can succeed.” “We seek disclosure of workforce diversity measures (gender, race, and ethnicity) at the executive, nonexecutive, and overall workforce levels.”

-Vanguard Investment Stewardship Insights (December 2020)

State Street

“The preponderance of evidence demonstrates clearly and unequivocally that racial and ethnic inequity is a systemic risk that threatens lives, companies, communities, and our economy ... [T]o ensure companies are forthcoming about the racial and ethnic composition of their boards and workforces ... [i]n 2021, we will vote against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not disclose the racial and ethnic composition of their boards; [i]n 2022, we will vote against the Chair of the Compensation Committee at companies in the S&P 500 that do not disclose their EEO-1 Survey responses; and [i]n 2022, we will vote against the Chair of the Nominating & Governance Committee at companies in the S&P 500 and FTSE 100 that do not have at least 1 director from an underrepresented community on their boards.”

-CEO Cyrus Taraporevala’s Letter on 2021 Proxy Voting Agenda (January 2021)

Corporate Governance

Ascendancy of ESG Considerations: Governance

• **Board Oversight of ESG Matters**

- Boards are evolving their oversight structures—for example, by creating new committees focused on ESG matters or by expanding the role of existing committees.
- While a recent PwC survey found that 51% of directors surveyed felt they fully understood ESG issues, investors are calling for competence. A recent study from NYU found that 29% of directors had relevant ESG credentials. On a deeper dive, the study found that 21% of the directors’ experience was in the “social” category, but only 6% of directors had relevant credentials in each of the “environment” and “governance” categories.
- Regarding increased disclosure of the Board’s oversight role, investors increasingly are asking boards to describe how they oversee management of key ESG risks, including the board’s role in reviewing corporate ESG disclosures—highlighting the need for proper diligence and controls to be in place.

• **Disclosures on Director/Board Matters**

- 2020 has seen increased calls for disclosure of individual director diversity (as an alternative to aggregate disclosures, such as [x]% of the board is “diverse”) and a related push for adoption of governance policies to increase board diversity, such as the Rooney Rule.
- Other actions being taken by boards include revising director selection criteria to consider non-traditional career pipelines (e.g., not just current/former CEOs).

Corporate Governance

Board Diversity

- **Nasdaq Proposed Rule:** The rule would require certain Nasdaq-listed companies to provide statistical information about each director’s self-identified gender, race, and self-identification as LGBTQ+ in a Board Diversity Matrix within one year of approval of the proposal rule.
- **Federal Legislation:** The “Improving Corporate Governance Through Diversity Act of 2019” would mandate proxy disclosure of voluntarily self-identified race, ethnicity, and gender for directors, director nominees, and executive officers—as well as any board-approved policy, plan or strategy to promote such diversity.
- **California Legislation:** The new law expands on 2018 legislation related to gender diversity on boards, requires every public company headquartered in California to have at least “one director from an underrepresented community” by December 31, 2021, and, depending on the size of the company, three such directors by December 31, 2022. The legislation is the subject of legal challenge.
- **Proxy Advisory Firm Policies:** ISS and Glass Lewis both updated policies:
 - Beginning in 2022, ISS will recommend “against” votes for the chair of the nominating committee (or other directors, on a case-by-case basis) where a board “has no apparent racially or ethnically diverse members” and no “mitigating factors” are disclosed.
 - Beginning this year, Glass Lewis will track the quality of disclosures regarding a board’s mix of diverse attributes and skills of directors, including the percentage of racial diversity, the board’s definition of diversity, and the board’s skills disclosure. Beginning in 2022, Glass Lewis generally will recommend votes “against” the nominating committee chair of a board with fewer than two female directors.

Corporate Governance

Shareholder Proposals

- 1 **Report on GHG Emissions and Conduct Annual Shareholder Advisory Vote on Emissions Reduction Plan**
- 2 **Proposals Regarding Diversity and EEO-1 Reporting**
- 3 **Report on Median Racial/Gender Pay Gaps**
- 4 **Conduct Racial Equity Audit and Issue Report on Audit**
- 5 **Diverse Candidate Search Policy for Ordinary Course Employee Hiring**
- 6 **Take Steps Necessary to Convert to a Public Benefit Corporation**

Proposals for the 2021 Proxy Season suggest a continued focus on Environmental and Social issues, with a number of the “hot” proposals this season being focused on racial equity, climate change, and/or on the corporation’s “purpose.”

Corporate Governance

Trends: Looking Ahead

• **Significant Trends for the 2021 Proxy Season**

- Early returns suggest companies may face opposition to say-on-pay proposals where management-favorable adjustments to performance targets have been made in response to poor performance caused by the COVID-19 pandemic.
- Virtual meetings will continue in 2021, with renewed emphasis and enhanced expectations on allowing shareholders to directly question management and the board.
 - Companies holding virtual meetings in 2021 may need to implement certain “best practices” to avoid criticism (e.g., provide a live video feed of the meeting presenters, the board, and management, and allow shareholders to ask questions over a live phone line).
 - ISS relaxed its expectations in 2020, but certain groups, like the Council of Institutional Investors (“CII”), still expressed significant concerns about the ability of shareholders to directly question management and the board.
 - For the 2021 proxy season, Glass Lewis generally will hold the governance committee chair responsible at companies holding virtual-only meetings that do not include robust disclosures in the proxy statement addressing the ability of shareholders to participate.

Corporate Governance

Update on Section 220 Demand Litigation

Section 220 of the Delaware General Corporation Law gives stockholders of Delaware corporations the ability to inspect certain corporate books and records if they have a “proper purpose” to seek them.

- In ***Juul Labs, Inc. v. Grove***, the court held that a plaintiff may not obtain books and records under another state’s books and records provision (namely, California’s corporate code), but instead must rely on Delaware’s Section 220. However, the court declined to rule on whether a shareholder can waive her Delaware-law-based inspection rights.
- As we noted last year, Section 220 demands are increasingly common, and 2020 was no exception:
 - In ***Hughes v. Hu***, a shareholder derivative suit related to alleged deficiencies in financial reporting and internal controls, the court drew a pleading-stage inference that the board was not fulfilling its oversight duties based on the company’s failure to produce exculpatory evidence in response to the plaintiff’s pre-suit Section 220 books and records demand.
 - In ***Woods v. Sahara Enterprises, Inc.***, the court granted the plaintiff’s Section 220 demand and held that the company’s assertion that it did not have access to the books and records sought bolstered the plaintiff’s claims against the board.
- In a December 2020 non-Section 220 ruling that has important privilege implications, the Delaware Court of Chancery held in ***In re WeWork Litigation*** that senior leaders could not assert the attorney-client privilege with respect to emails sent and received on non-company email accounts because they had no reasonable expectation of privacy in these accounts.

Corporate Governance

Shareholder Derivative Litigation

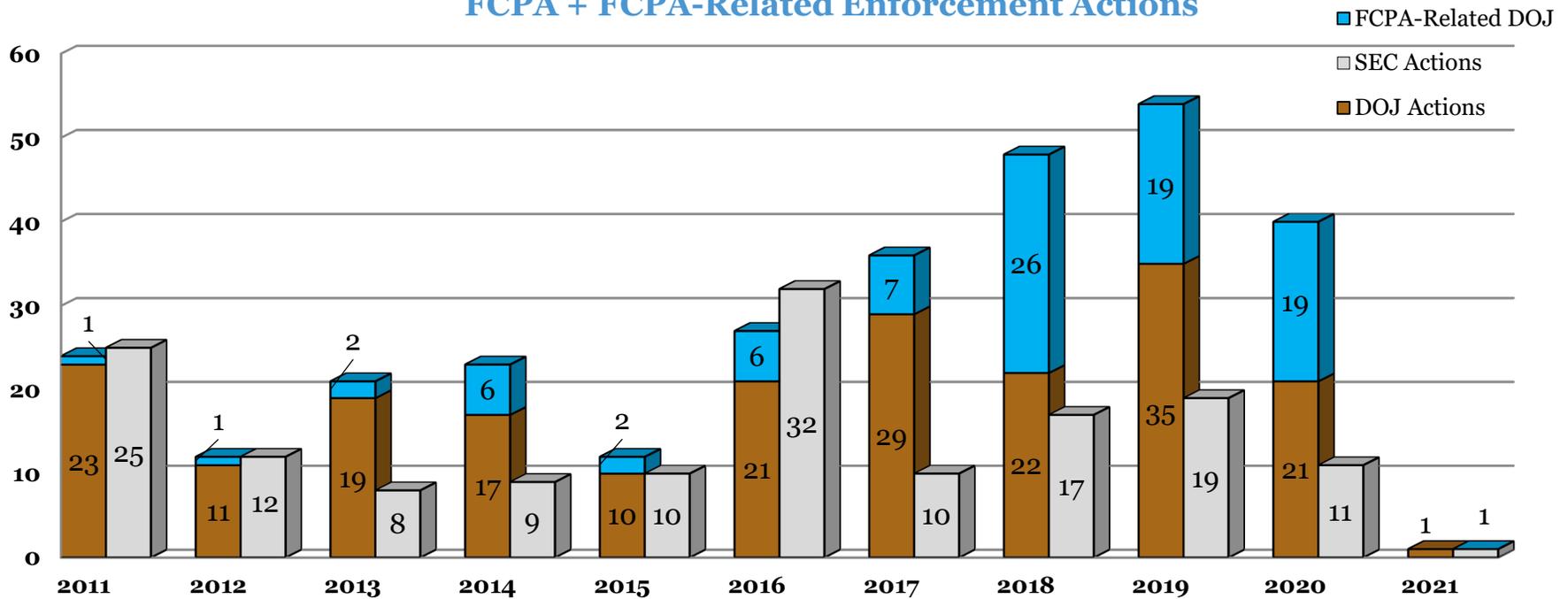
- In September, Alphabet (Google's parent company) settled the consolidated derivative litigation against it related to **sexual harassment and discrimination** allegations. As part of the settlement, Alphabet promised to create a \$310 million diversity and inclusion fund, in addition to other institutional reforms.
 - This likely is one of the largest monetary settlements to a shareholder derivative suit ever.
- In 2020, several companies faced shareholder derivative suits related to their practices around **racial diversity**. These lawsuits addressed a variety of racial equity issues, from alleged discriminatory labor practices to the lack of diversity on these company's boards and among their senior executives.
- Continuing the trend of significant litigation following cybersecurity incidents, a shareholder derivative suit was filed in April 2020 against LabCorp's board related to two **data breaches**.
- Shareholder derivative actions filed in 2017 against McKesson relating to reporting practices for controlled substances were settled for \$175 million; as part of the settlement, the company agreed to implement certain changes to its corporate governance.

White Collar and Securities Fraud

FCPA Enforcement by the Numbers

- Although the number of FCPA enforcement actions was down in 2020, the total value of imposed financial penalties and disgorgement increased significantly.
 - DOJ and the SEC imposed record-breaking corporate fines in FCPA cases totaling \$2.78 billion.
 - In 2020, the SEC and DOJ brought 11 and 21 FCPA enforcement actions, respectively. DOJ also brought an additional 19 FCPA-related enforcement actions.

FCPA + FCPA-Related Enforcement Actions



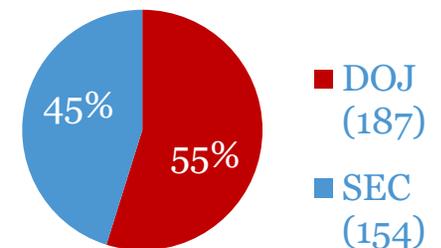
* As of February 16, 2021.

White Collar and Securities Fraud

DOJ and SEC FCPA Enforcement

- DOJ and the SEC published the second edition of “A Resource Guide to the U.S. Foreign Corrupt Practices Act,” a consolidated manual providing the agencies’ perspectives on the FCPA. Notable updates include additional guidance on:
 - The FCPA accounting provisions, which among other things require companies to establish processes that provide “reasonable assurances” regarding the reliability of financial reporting and preparation of financial statements;
 - Successor liability in the mergers and acquisition context for FCPA misconduct uncovered after an acquisition; and
 - The evaluation of anti-corruption compliance programs.
- Authorities in France, the UK, and the United States imposed a record-breaking \$3.9 billion in penalties on Airbus SE as part of a global resolution to settle FCPA and export controls-related charges. More than \$3.67 billion of the imposed penalties related to anti-corruption matters.
- The Goldman Sachs Group Inc. reached a multi-billion dollar coordinated resolution with the SEC, DOJ, and other national and international regulatory authorities in connection with FCPA violations arising from the 1MDB case.

**Total FCPA
Enforcement Actions
(2011- 2021)***



* As of February 16, 2021.

White Collar and Securities Fraud

United Kingdom Update

- The SFO reached three Deferred Prosecution Agreements (“DPAs”) in 2020:
 - Airbus SE**: Required payment of €991 million in fines and costs.
 - G4S Care and Justice Services (UK) Ltd**: Assessed a financial penalty of £38.5 million and payment of the SFO’s costs of £5.9 million.
 - Airline Services Limited**: Imposed nearly £3 million in combined penalties, disgorgement, and costs.
- The Court of Appeal lowered the bar for proving dishonesty in criminal cases by removing the subjective element to the test, thus affirming that the *Ivey* test is the controlling analysis.
- The SFO released internal guidance from its Operational Handbook twice in 2020:
 - The SFO released a chapter titled “Evaluating a Compliance Programme” in January that broadly discusses when and how the SFO will consider the effectiveness of a compliance program in its investigation.
 - In October, the SFO released a chapter describing its approach to DPAs; however, the guidance does not provide much detail on what the SFO expects from cooperating companies beyond what has been previously published.

White Collar and Securities Fraud

Criminal Export Control Developments

- The **Commerce Department's BIS** has begun identifying and imposing new export controls on technologies that are essential to national security but not currently subject to restrictive controls.
- BIS announced a new Huawei-specific Direct Product Rule that increases the number of items subject to U.S. export controls. Under this rule, an item is subject to export controls if (1) it was incorporated into or used to produce or develop an item made, bought, or ordered by Huawei; or (2) if Huawei will participate in a transaction involving the item.
- BIS added twenty entities to the Entity List for human rights violations in 2020.
 - Placing an entity on the BIS list restricts the export, reexport, or transfer of items to persons reasonably believed to be involved, or to pose a significant risk of becoming involved, in activities contrary to U.S. national security or foreign policy interests.
- The **U.S. Department of Treasury's Office of Assets Control ("OFAC")** issued an advisory concerning the potential sanctions risks arising from facilitating ransomware payments on behalf of a victim if it is later determined there was a sanctions nexus arising from the payment.



Antitrust

U.S. Update: Criminal Enforcement – Labor Market Enforcement

- In late 2020 and early 2021, DOJ announced its first criminal antitrust charges alleging agreements to restrain competition in labor markets.
 - This follows 2016 guidance to HR professionals in which DOJ asserted it “intends to proceed criminally against naked wage-fixing or no-poaching agreements” because such “agreements eliminate competition in the same irredeemable way” as other “hardcore cartel conduct.”
- In December 2020, DOJ announced wage-fixing charges in the Eastern District of Texas against the owner of a staffing company for allegedly conspiring to fix prices by lowering the wages for physical therapists and physical therapist assessments.
- In January 2021, DOJ brought criminal charges in the Northern District of Texas alleging that a health care company agreed with other companies in the field not to solicit each other’s senior-level employees.

Antitrust violations affecting labor markets remain “*one of the Division's highest priorities and an area to which we are devoting substantial resources.*”

–Richard Powers,
Acting Assistant Attorney General
(Nov. 14, 2019)

Antitrust

U.S. Update: Criminal Enforcement – 2020 Highlights

- DOJ's Antitrust Division continued ongoing cartel investigations targeting generic pharmaceuticals and broiler chickens.

- In 2020, five generic pharmaceutical companies and two individual executives were charged with price-fixing, with three corporate defendants receiving DPAs and agreeing to a total of nearly \$425M in fines.

- Three additional defendants are expected to go to trial in 2021.

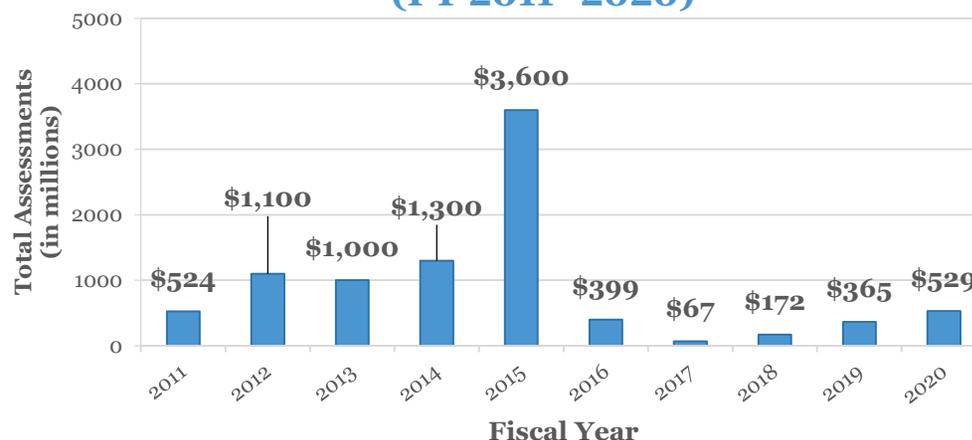
- Ten executives or employees of chicken suppliers, including two CEOs, were indicted in 2020 for alleged price-fixing and bid-rigging related to broiler chickens.

- Two individual defendants convicted at trial were sentenced in 2020.

- In June, the former CEO of a seafood company was sentenced to 40 months imprisonment for canned tuna price-fixing.

- In September, a former currency trader was sentenced to 8 months for participating in FX price manipulation.

Total Criminal Fines & Penalties from Antitrust Division Investigations (FY 2011–2020)



Antitrust

Mergers: Policy Changes and Trends

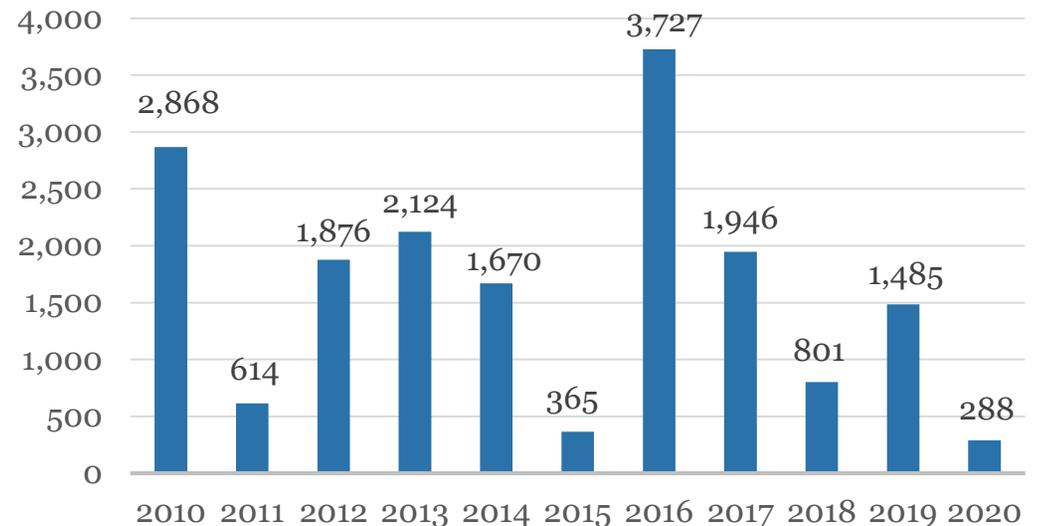
- In September 2020, DOJ released a new Merger Remedies Manual, concluding a two-year policy reconsideration process. The new Manual includes a number of important revisions, including:
 - Strong preference for structural relief in both horizontal and vertical merger cases;
 - Remedies for challenges to consummated mergers;
 - Specific consent decree terms likely to be required in future settlements; and
 - Responsibilities of the newly created Office of Decree Enforcement and Compliance.
- Both the FTC and European Commission indicated in 2020 that they would begin examining transactions that are technically below statutory thresholds for merger reporting, but that still have the potential to “seriously affect competition.”
 - Information requests from the FTC related to this initiative appeared aimed at large technology companies acquiring new or potential future competitors in non-reportable transactions.
 - One example of this trend is the Antitrust Division’s November 2020 lawsuit against a company that planned to acquire a “nascent competitor.”
- Senator Klobuchar’s proposed antitrust reform bill includes provisions to make merger approval more difficult, specifically barring mergers that “create an appreciable risk of materially lessening competition,” rather than the current standard of a demonstrable reduction in competition.
 - In some cases, companies would have the burden of proving the merger will not hurt competition, reversing the current paradigm requiring enforcers to prove that competition will be harmed.

Antitrust

European Union Update

- In 2020, the EC levied fines in a “purchasing cartel” in the ethylene sector, as well as fines related to retail food packaging and car parts.
- Throughout 2020, EU authorities signaled a desire for stricter competition enforcement against big tech.
 - In November, the EU sent a Statement of Objections to a major online retailer, alleging that it uses data relating to third-party merchants who sell through the retailer’s websites in a manner that infringes EU competition rules.
 - In December, the EC proposed sweeping new regulations of the tech industry which would prohibit a broad range of practices, including so-called self-preferencing.

**European Commission Cartel Fines
(€ in millions) (2010 – 2020)**



“[W]ith size comes responsibility.”

– Margrethe Vestager, European Commissioner for Competition (Dec. 15, 2020)

Antitrust

United Kingdom Update and Brexit Impacts

- On December 31, 2020, the UK ended a Brexit transition period during which EU competition law continued to apply, with competition jurisdiction transferring as of January 1, 2021 to the UK's Competition and Markets Authority ("CMA").

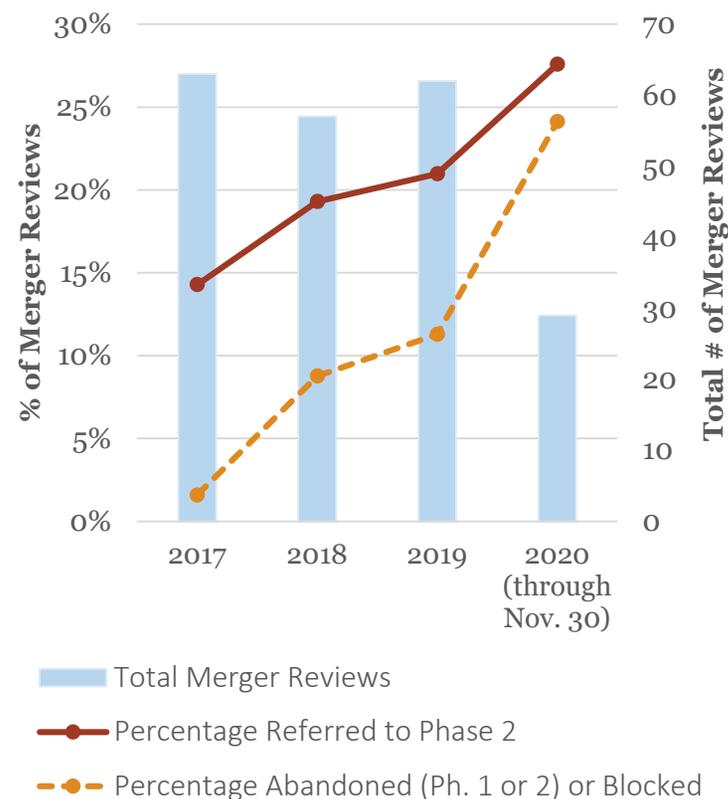
–However, pre-Brexit decisions by the European Commission will remain in force, and UK courts will apply EU law to any alleged antitrust violations that took place before the end of the transition period.

- The CMA continued a recent pattern of aggressive intervention in transactions, including a focus on technology companies and online markets.

–The share of mergers referred from Phase 1 to Phase 2 investigations, and the share of mergers blocked or abandoned, has trended upwards in recent years.

–Only 2% of reviewed mergers were blocked or abandoned in 2017, compared with 24% in the first 11 months of 2020.

Percentage of CMA Merger Reviews Referred to Phase 2 or Abandoned/Blocked



Antitrust

APAC Update

• **China**

- The State Administration for Market Regulation (“SAMR”) released antitrust guidelines detailing the leniency approach for cartels, formal procedures to end a monopoly case through commitments, vertical and horizontal safe harbor provisions related to IP rights, and guidance specific to the auto industry.
 - The leniency guidelines provide beneficial clarity by formalizing SAMR leniency policy, but also require leniency applicants to provide more information in their application, compared to previous draft guidance.
- Just this month, SAMR published final antitrust guidelines governing Big Tech. The final guidelines removed a provision concerning data as an essential facility and restored the requirement that SAMR define a relevant market in abuse of dominance cases.

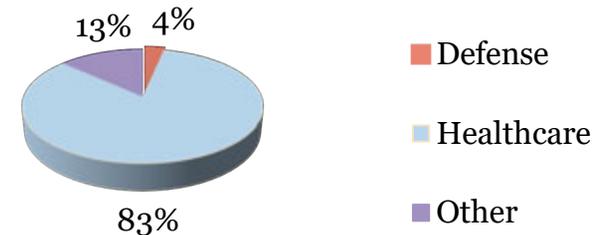
• **Korea**

- Following a proposal by the Korea Fair Trade Commission (“KFTC”), the legislature in December 2020 amended the antitrust law to strengthen antitrust enforcement powers—including doubling the maximum administrative fines, improving due process in KFTC proceedings, and clarifying statutory language.

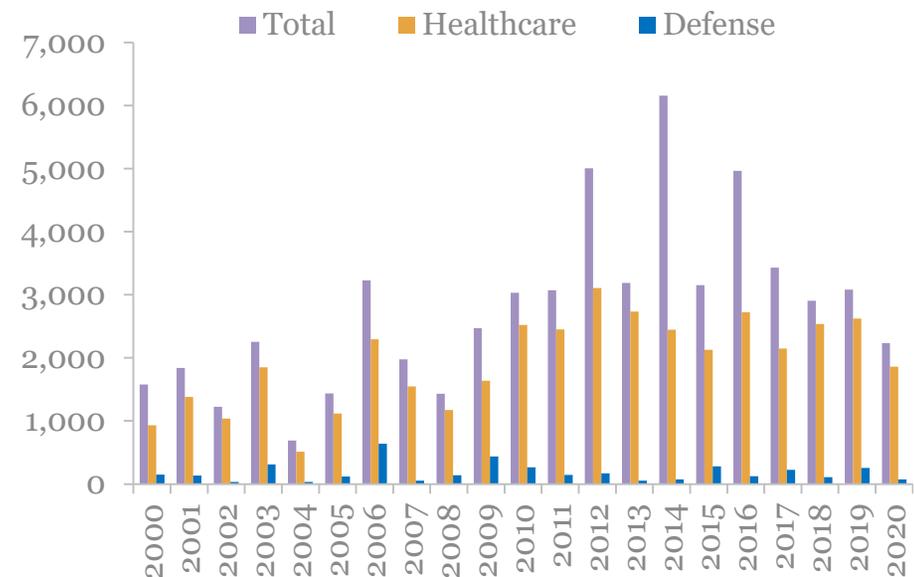
False Claims Act

- 2020 saw the government and *qui tam* relators initiate the most new False Claims Act (“FCA”) investigations ever.
- Federal stimulus efforts are sowing the seeds for potentially significant FCA enforcement efforts in 2021 and beyond, and the challenging domestic economic and employment landscape may well catalyze whistleblower complaints.
 - In 2020, the government enacted legislative stimulus packages totaling nearly \$4 trillion in COVID-relief funds.
 - A huge portion of that spending has been in healthcare and healthcare-adjacent fields, areas that have accounted for more than 80% of all FCA recoveries over the last three years.
 - The government has announced that FCA enforcement related to COVID-19 funding will be a priority in the months and years ahead.

2020 FCA Recoveries from the Defense and Healthcare Industries



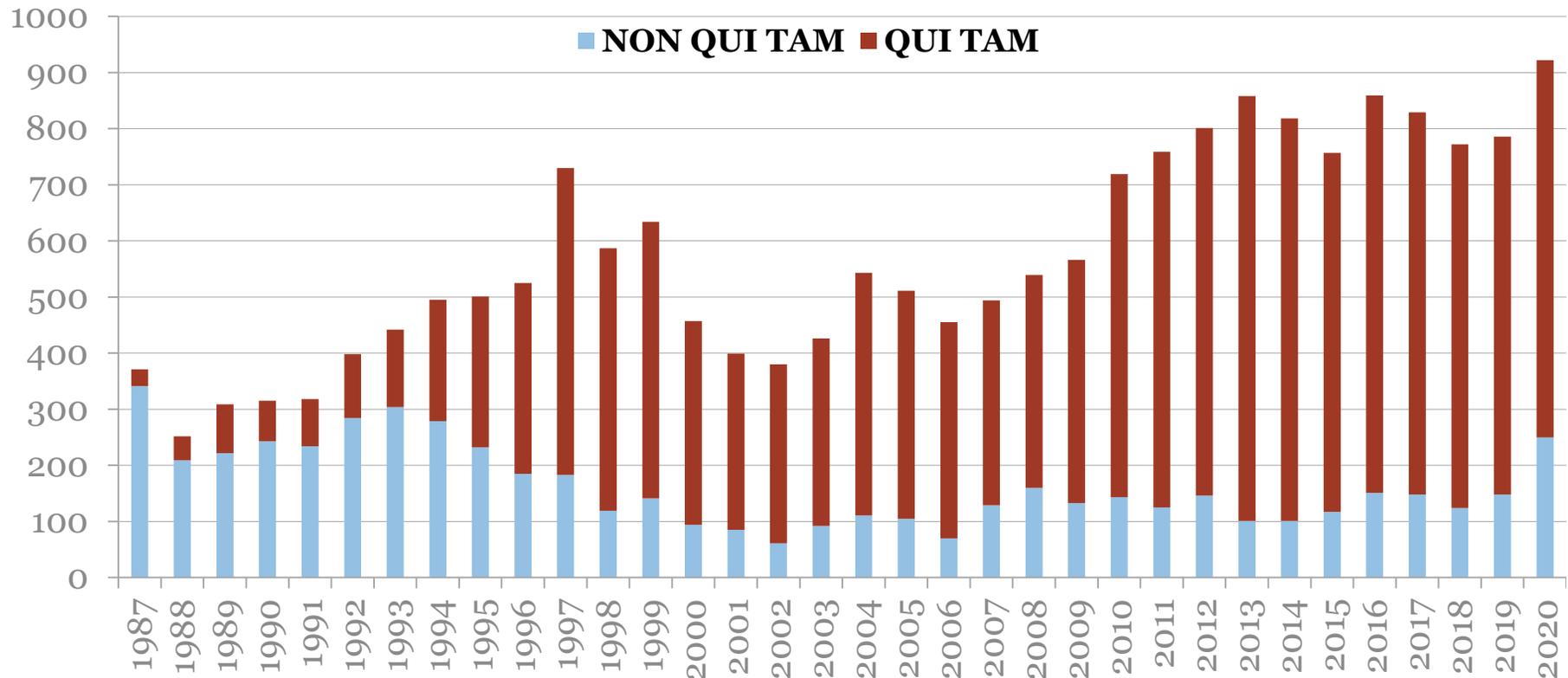
Annual FCA Recoveries by Industry (millions)



False Claims Act

Annual New Matters (1987 – 2020)

- The government and *qui tam* relators initiated 922 new FCA cases in 2020. This is the largest single-year total ever—by a substantial margin—and brings the total number of new FCA cases opened in the last 5 years to more than 4,100 cases.
 - Federal enforcement attorneys filed 250 new cases in 2020, a high-water mark last seen in 1994.



*Statistics refer to fiscal year.

2020 DOJ Healthcare False Claims Act Enforcement *By the Numbers*



>\$2 billion

FCA civil recoveries from **settlements** with healthcare providers and pharmaceutical and medical device companies in 2020



>\$1.3 billion

from civil settlements involving **alleged Anti-Kickback Statute** violations in 2020



2nd

Despite COVID-related obstacles to enforcement, FY 2020 was **very close** (but slightly behind) the pace set by DOJ in FY 2019 for FCA civil recoveries with healthcare entities

False Claims Act

Key Policy Developments

- **Increased FCA penalties in 2020:** For FCA penalties assessed after June 19, 2020 (and applicable to violations occurring after November 2, 2015), the minimum per-claim penalty is now \$11,665 (up from \$11,181) and the maximum penalty is now \$23,331 (up from \$22,363).
- **DOJ Guidance:** DOJ issued an interim final rule that limited use of guidance documents in criminal and civil enforcement actions to implement the requirements of Executive Order 13891.
- **Pandemic-Related Developments:** DOJ made clear that it views the FCA as a prime tool for addressing fraud in COVID-19 stimulus programs, including to combat fraud in the Paycheck Protection Program (“PPP”).

“You should expect, for example, that going forward the False Claims Act will play a central role in the Department’s pursuit of COVID-19 related fraud. ... While the circumstances of the current pandemic may be novel, the inevitable fraud schemes it will produce will in many cases resemble misconduct that the [FCA] has long been used to address.”

–Michael D. Granston,
Deputy Assistant Attorney General
(Dec. 2, 2020)

False Claims Act

Focus on DOJ FCA Enforcement Tools in the COVID Era

- The CARES Act created a Pandemic Response Accountability Committee (“PRAC”) and Special Inspector General for Pandemic Recovery (“SIGPR”), which is empowered to conduct audits and investigations into CARES Act relief programs.
 - In June 2020, the Senate confirmed Brian Miller, previously a GSA inspector general, as the SIGPR.
- In a March 16, 2020 memorandum to all U.S. Attorneys and a March 20, 2020 press release, then-AG Barr announced that DOJ would prioritize the investigation and prosecution of COVID-related fraud.
 - In addition, then-AG Barr directed U.S. Attorneys to appoint a “Coronavirus Fraud Coordinator” in each district—responsible for coordinating enforcement and conducting public outreach and awareness—and established a national system for whistleblowers to report suspected fraud.
- DOJ will combat COVID-related fraud using MOUs between SIGPR and USAOs, as well as various DOJ-Agency Partnerships (e.g., HHS, FTC, SEC).

“The Civil Division is working closely with various inspectors general and other agency stakeholders to identify, monitor and investigate the misuse of critical pandemic relief, and we expect this collaborative effort to translate into significant cases and recoveries in the coming years.”

*–Brian Boynton,
DOJ Civil Division Acting
Head (Feb. 17, 2021)*

False Claims Act

Early COVID-19 Enforcement Actions

- DOJ has sent a clear message regarding its prioritization of COVID-related enforcement actions by quickly prosecuting fraud cases involving COVID-related fraud schemes within the first few months of the pandemic:
 - April 2020**: DOJ announced that an Atlanta, Georgia resident had been arrested and charged with wire fraud for attempting to sell millions of nonexistent respirator masks to the Department of Veterans Affairs in exchange for large upfront payments.
 - June 2020**: The U.S. Attorney’s Office for the District of New Jersey charged a Chinese manufacturer with producing and exporting half a million misbranded and defective masks falsely purporting to be N-95 respirator masks.
 - July 2020**: In a meeting of cyber and health-related enforcement, the U.S. Attorney’s Office for the Western District of Kentucky announced that it had filed a lawsuit in federal court to shut down a webpage, six related web addresses, and a Facebook page that allegedly attempted to lure consumers to “pre-register” for the then-non-existent COVID-19 vaccine in exchange for \$100 worth of Bitcoin.

False Claims Act

Notable Decisions: Objective Falsity

- Appellate courts have continued to weigh in on the extent to which plaintiffs must demonstrate an objective falsehood in order to establish FCA liability.
 - In 2020, the Third and Ninth Circuits added to the circuit split over whether a mere difference in medical opinion between physicians may be sufficient in certain circumstances to show that a statement is “false” for purposes of FCA liability.
- The Supreme Court denied on Monday, February 22, 2021, without comment, the petition for a writ of certiorari from the defendant in *United States ex rel. Druding v. Care Alternatives*.

Reasonable Disagreement Sufficient:

3rd Circuit (*Druding*) – Difference of opinion causes triable issue of falsity

9th Circuit (*Winter*) – Contradictory evidence can establish falsity

10th Circuit (*Polukoff*) – Reasonable differences cause triable issue of falsity

Reasonable Disagreement Typically Insufficient

5th Circuit (*Riley*) – “Lies” but not mere “errors” can establish falsity

6th Circuit (*Paulus*) – “Good faith” opinion does not establish falsity

11th Circuit (*AseraCare*) – Reasonable differences are insufficient to establish falsity

False Claims Act

Notable Decisions

• **Materiality Post-Escobar**

- The Second Circuit in *United States v. Strock* considered what qualifies as a “payment decision” for purposes of assessing materiality under a fraudulent inducement theory of FCA liability, interpreting both the government’s initial contract award and subsequent payments of claims as “payment decisions” requiring a materiality analysis under Escobar.
- In *United States ex rel. Porter v. Magnolia Health Plan, Inc.*, the Fifth Circuit held that boilerplate contract language generally requiring the defendant to follow all laws was not sufficient to establish an FCA claim.

• **DOJ’s Discretion to Dismiss Qui Tam Claims**

- In *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, the Seventh Circuit suggested that the split between the *Swift* (deferential) and the *Sequoia Orange* (less deferential) standards may have little practical significance, calling the choice between the two standards “a false one, based on a misunderstanding of the government’s rights and obligations under the [FCA].” The court concluded that DOJ’s exercise of its dismissal authority should rather be evaluated under the Fed. R. Civil Procedure 41 standard concerning voluntary dismissals.

False Claims Act

Focus on the Opioid Epidemic



- Combating the opioid epidemic remains a top enforcement priority, with 2020 bringing some of the highest-ever settlements to resolve FCA cases related to opioids:
 - In October, DOJ announced that it reached a resolution with Purdue Pharma, the maker of OxyContin, in the largest-ever resolution in a case brought by DOJ involving an opioid drug. Purdue Pharma agreed to plead guilty to a three-court felony indictment and to pay over \$8 billion to resolve criminal and civil allegations associated with the marketing of the drug.
 - Of the \$8 billion settlement, Purdue agreed to pay \$2.8 billion to resolve its civil FCA liability and the Sackler family separately agreed to pay \$225 million to resolve its civil FCA liability.
 - In July, Indivior Solutions pleaded guilty to a felony and agreed to pay a total of \$600 million to resolve criminal and civil liability associated with the marketing of the opioid-addiction-treatment drug Suboxone, \$300 million of which will resolve FCA claims.
 - This \$600 million resolution, coupled with a 2019 \$1.4 billion resolution with Indivior's former parent company and a 2020 plea agreement with Indivior plc's former CEO, brings the total resolution relating to the marketing of Suboxone to more than \$2 billion. Prior to the Purdue Pharma settlement, this was the largest-ever resolution in a case brought by DOJ involving an opioid drug.

Bank Secrecy Act/Anti-Money Laundering

Key Trends and Developments

- State and federal regulators continued to focus on (1) regulating cryptocurrency and digital assets by issuing guidance and pursuing enforcement actions; and (2) the strength of corporate Bank Secrecy Act (“BSA”)/Anti-Money Laundering (“AML”) compliance programs.
- The Anti-Money Laundering Act of 2020 enacted widespread changes to the BSA and other AML and CTF reforms, including:
 - National registry of beneficial ownership information;
 - Additional statutory authority for DOJ to seek documents from foreign financial institutions;
 - Required efficiency studies related to the BSA requirements and streamlining CTR and SAR requirements;
 - Enhanced penalties under the BSA for repeat offenders;
 - Enhanced information-sharing provisions;
 - BSA whistleblower provision; and
 - Addition of digital currency in BSA definition of “coins and currency.”

Key Trends in BSA/AML Enforcement

- Continued focus from regulators on the strength of corporate compliance programs, particularly with respect to the pillars of BSA/AML compliance programs
- Increased regulation of cryptocurrency and other FinTech platforms
- Increasing links between AML enforcement actions and FCPA and sanctions enforcement actions

Bank Secrecy Act/Anti-Money Laundering

FinCEN Enforcement Guidance



- In August 2020, FinCEN released guidance regarding its approach to enforcing the BSA. The guidance included three key points:
 - Clarification that, in bringing enforcement actions, the agency will seek to establish violations of laws and regulations and will not treat non-compliance with standards of conduct promulgated in guidance documents as a violation;
 - Clarification of the types of actions FinCEN might take when an actual or potential violation of law is identified, including: no action, a warning letter, equitable remedies, a settlement, a civil money penalty, and/or a criminal referral; and
 - Identification of the factors FinCEN will consider in bringing enforcement actions.

FinCEN Enforcement Factors:

1. Nature and seriousness of the violations
2. Impact or harm of the violations on FinCEN's mission to safeguard the financial system
3. Pervasiveness of wrongdoing
4. History of similar violations, or misconduct in general
5. Financial gain or other benefit
6. Presence or absence of prompt, effective action to terminate the violations
7. Timely and voluntary disclosure
8. Quality and extent of cooperation with FinCEN and other relevant agencies
9. Systemic nature of violations
10. Whether another agency took enforcement action for related activity

Bank Secrecy Act/Anti-Money Laundering

Banking Regulators' Joint Enforcement Guidance

- In August 2020, the Federal Reserve, FDIC, NCUA, and OCC issued joint guidance clarifying the circumstances in which they would take enforcement action for non-compliance with the BSA.
- The joint statement:
 - Emphasizes that isolated or technical deficiencies generally will not result in mandatory cease and desist orders;
 - Sets forth specific types of BSA/AML program deficiencies that would or would not result in a cease and desist order; and
 - Identifies the pillars of BSA/AML compliance programs as a system of internal controls, independent testing, designated individual(s) responsible for BSA/AML compliance, and training.



Bank Secrecy Act/Anti-Money Laundering

FinCEN CDD and PEP Guidance



Customer Due Diligence (“CDD”) FAQs

- FinCEN made clear in these FAQs that the CDD Rule does not categorically require the collection of any particular customer due diligence information (e.g., media searches) or the updating of that customer information on a specific schedule.
- Rather, covered financial institutions may take a risk-based approach to collecting and updating customer information, based on established policies and procedures.
- Financial institutions also do not have to use a specific method to risk-rate customers.

Politically Exposed Persons (“PEPs”) Updated Guidance

- FinCEN and other agencies issued a joint statement clarifying the BSA due diligence requirements for customers who may be considered PEPs.
- The joint statement articulates the message that not all PEPs are high risk. Rather, a risk determination reflects the facts and circumstances specific to the relationship, and due diligence should be commensurate with that risk.
 - Examples of relevant facts and circumstances factoring into the risk determination include the volume and nature of transactions; type of products and services used; relevant jurisdiction(s); the customer’s public office and level of influence; the customer’s access to significant government assets or funds; and the overall nature of the customer relationship.

Bank Secrecy Act/Anti-Money Laundering

FinCEN ANPRM



Recordkeeping and Travel Rule

- In October 2020, FinCEN and the Federal Reserve announced a joint ANPRM that would amend the recordkeeping and travel rule regulations under the BSA. The proposal would:
 - Reduce the recordkeeping and travel rule thresholds from \$3,000 to \$250 for transmittals that begin or end outside the U.S.;
 - Clarify that “money” as used in these provisions includes convertible virtual currency; and
 - Clarify that these rules apply to domestic and cross-border transactions involving digital assets that have legal tender status.

AML Effectiveness ANPRM

- In September 2020, FinCEN solicited public comment on incorporating an “effective and reasonably designed” AML program component into the BSA regulations. Elements include:
 - Identifying, assessing, and mitigating risk from illicit financial activity consistent with the institution’s risk profile and the risks communicated by relevant government authorities;
 - Assuring and monitoring compliance with BSA recordkeeping and reporting requirements; and
 - Providing information with a high degree of usefulness to government authorities.

Bank Secrecy Act/Anti-Money Laundering

Cryptocurrency Regulation and Enforcement

- Law enforcement and regulator activity demonstrates an increased focus on providers of cryptocurrency-related services, particularly with respect to BSA compliance. Pursuant to this increased focus, regulators took several notable actions against cryptocurrency providers:
 - In October, **DOJ** unveiled charges against four executives of BitMEX, alleging that they willfully failed to comply with BSA program compliance requirements, while the **CFTC** brought a companion civil enforcement action against several BitMEX-related individuals and entities.
 - Also in October, **FinCEN** announced a \$60 million civil penalty assessed against the founder of Helix, a convertible virtual currency “mixer” or “tumbler,” alleging that he had willfully violated the BSA’s registration, compliance, monitoring, and suspicious activity reporting rules. There also is a pending federal criminal action in D.C. District Court against the founder on related charges.
 - OFAC** announced settlements with BitGo, Inc. in December 2020 and BitPay, Inc. in February 2021 related to deficiencies in their compliance programs. The announcements focused on the standards for compliance programs for cryptocurrency providers (the same standards as those in the fiat space).
- In October 2020, federal regulatory agencies released or previewed key guidance and regulations related to cryptocurrency:
 - DOJ** published its Cryptocurrency Enforcement Framework, which outlines how cryptocurrency could be used illicitly and describes federal legal and regulatory tools for combating such uses.
 - FinCEN** announced that it would issue further regulations regarding cryptocurrencies by issuing a Notice of Proposed Rulemaking soliciting comments on proposed amendments to modify the Travel Rule by changing the existing definition of money to include CVCs.

Bank Secrecy Act/Anti-Money Laundering

AML Under the New Administration

- **Continued Emphasis on BSA/AML Investigations:** International, federal, and state regulators/enforcers remain keenly focused on BSA/AML compliance. Regulators and enforcers have indicated they will focus on financial institutions' response to COVID-19.
- **Broad Application of AML Requirements:** Actions against crypto-businesses illustrate the broad view U.S. regulators are taking in mandating adequate AML compliance, and their focus on virtual currencies and individual liability. Developments in the application of BSA rules to sports betting, additional crypto regulations, further attention on the real estate industry, and enactment of pending legislation may bring about further change.
- **Case Convergence:** We will continue to see cases that reflect the intersection between AML, FCPA, and sanctions enforcement.
- **FinTech:** Legislators and regulators will continue to try to ensure that financial technology platforms are not used for money laundering.
- **Corporate Governance:** Sanctions and AML regulators are increasingly interested in corporate compliance, as reflected by compliance requirements in recent OFAC settlements as well as revised DOJ compliance guidance suggesting that these principles will have continued prominence in the AML space.

Anti-Money Laundering

United Kingdom



In the UK, as a result of legislation passed in 2017, prosecutors can seek an “**unexplained wealth order**” (“UWO”) to require the targets to reveal their source(s) of wealth.

- On February 5, Zamira Hajiyeva—the first UWO recipient and wife of the jailed International Bank of Azerbaijan chairman—lost her appeal against two UWOs issued in 2018.
- If Ms. Hajiyeva cannot explain the source of her wealth, the National Crime Agency (“NCA”) will seize her assets, including a London home purchased for £11.5 million and a Berkshire golf course purchased for £10.5 million.
- In April 2020, the High Court threw out three UWOs against Nurali Aliyev, the grandson of Kazakhstan’s former leader, for failing to provide “reasonable grounds” that the assets were proceeds of serious crime.



In November 2019, the NCA reported that it had received a record number of SARs (478,437) and a 52.72% increase in requests for a Defence Against Money Laundering SARs in the period 2018 to 2019.

Anti-Money Laundering

Combined EU Action Plan 2020/2021



“We need to put an end to dirty money infiltrating our financial system. Today we are further bolstering our defenses to fight money laundering and terrorist financing, with a comprehensive and far-reaching Action Plan. There should be no weak links in our rules and their implementation.”

- Valdis Dombrovskis, Executive VP of the European Commission (May 7, 2020)

Six pillar approach:

- Strengthen **EU's global role** with new tools to combat third-world country AML deficiencies, e.g., alignment with FATF list.
- **Effective application of EU rules** on national level with constant monitoring by European Banking Authority.
- **Single EU Rulebook** to develop cohesion within 27 national legal frameworks.
- **EU-level supervision** to assure EU Member State's private sector measures are up to EU standards.
- **Coordination/support mechanism** for EU Member's Financial Intelligence Units as hubs of financial intelligence, e.g., by establishing a refined methodology to identify high-risk countries.
- **Enforcing EU-level criminal law provisions/information exchange** by creating Financial Crime Centre at EUROPOL and an EU-wide AML supervisory system guided by European Commission.

Sixth EU AML Directive

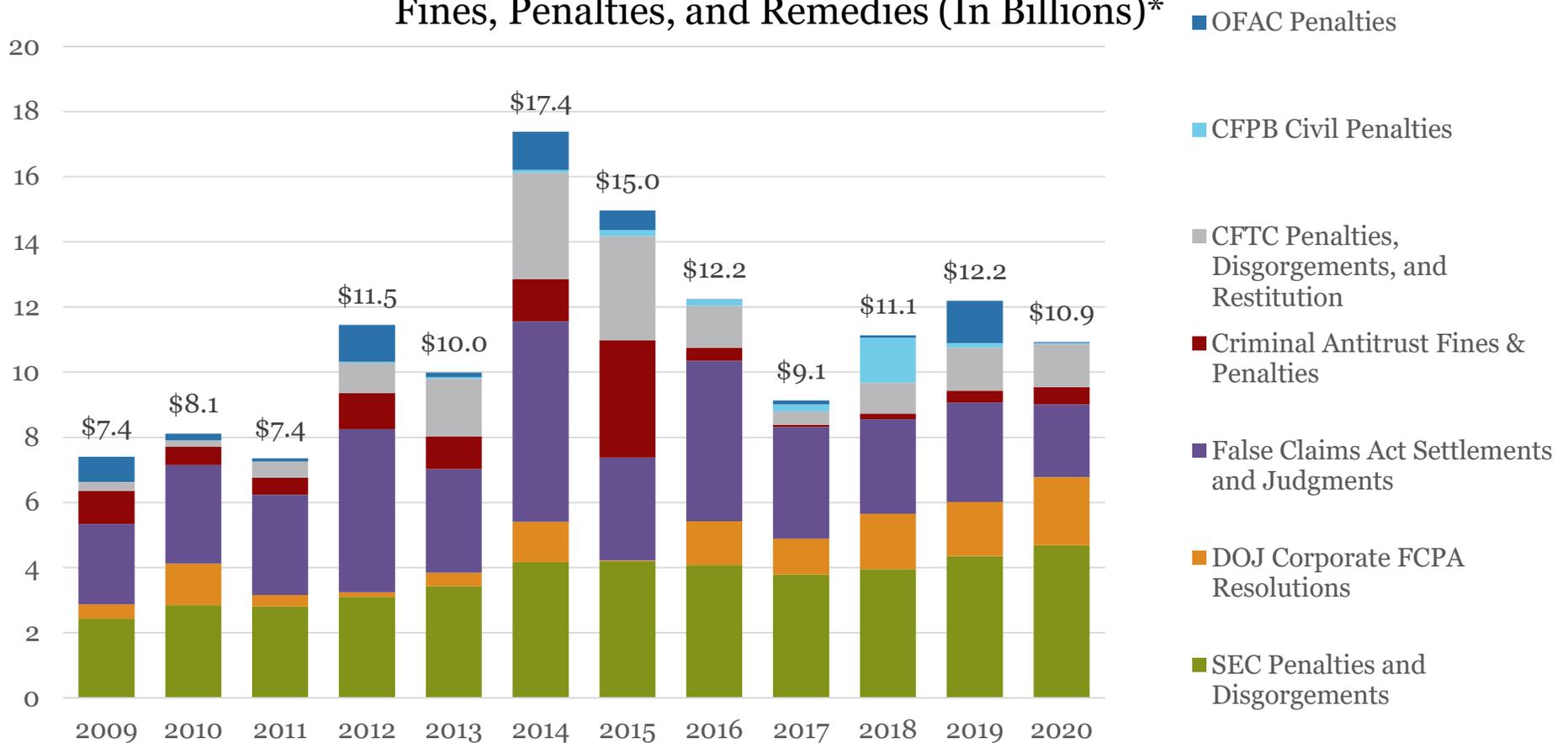
- EU Member States were required to transpose the EU's Sixth Anti-Money Laundering Directive (“AMLD6”) into national law by December 3, 2020, and relevant regulations must be implemented by June 3, 2021.
- AMLD6 will harmonize the definition of money laundering across EU Member States, with the aim of closing loopholes in the AML legislation of some EU Member States.

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U.S. Agencies: Priorities, Policies, and Penalties

U.S. Fines, Penalties, and Remedies

Fines, Penalties, and Remedies (In Billions)*



* GDC Internal Aggregations. CFPB Civil Penalties do not include CFPB recoveries and restitutions. The CFPB formally began operating in July 2011. All figures are tracked by fiscal year except for DOJ Corporate FCPA resolutions and OFAC penalties, which are tracked by calendar year.

Top 2020 Fines and Penalties

Anti-Corruption, Antitrust, FCA, and FIRREA Offenses

Amount	Industry	Area
\$3B	Financial Services	FIRREA
\$2.8B	Pharmaceuticals	False Claims Act
\$1.66B	Financial Services	FCPA
\$920M	Financial Services	CFTC
\$678M	Pharmaceuticals	False Claims Act
\$337.8M	Pharmaceuticals	FCPA
\$300M	Pharmaceuticals	False Claims Act
\$294.5M	Aerospace	FCPA
\$205.7M	Pharmaceuticals	Antitrust
\$195M	Pharmaceuticals	Antitrust
\$122M	Hospital Management	FCA
\$100M	Oncology Treatment	Antitrust

Details on DOJ Enforcement in 2020

Changes in Top Leadership



- On January 20, 2021, top leadership at the Department of Justice transitioned to a number of acting officials:
 - Monty Wilkinson, *Acting Attorney General*
 - John Carlin, *Acting Deputy Attorney General*
 - Matthew Colangelo, *Acting Associate Attorney General*
- President Biden’s pick for Attorney General was one of his most high-profile cabinet appointments. In early 2021, President Biden announced key nominations for the Department of Justice:
 - Judge Merrick Garland, *nominee for Attorney General*
 - Lisa Monaco, *nominee for Deputy Attorney General*
 - Vanita Gupta, *nominee for Associate Attorney General*
 - Kristen Clarke, *nominee for Assistant Attorney General for the Civil Rights Division*

DOJ Under the Biden Administration

Anticipated Shifts in DOJ's Strategic Priorities



- We anticipate DOJ's enforcement priorities under Attorney General-nominee Garland to shift away from the previous administration's focus on violent crime, border protection, and narcotics enforcement.

Potential Biden Administration Priorities

1. Pandemic and recession-related financial crimes
2. Environmental and climate-related crimes
3. Renewed emphasis on protecting civil rights, including voting rights and policing reform
4. Continued focus on combating fraud against consumers and fraud victimizing the general public
5. Increased emphasis on combating domestic terrorism and hate groups
6. Continued focus on FCPA, sanctions, AML and cybersecurity
7. Fighting foreign efforts to influence U.S. politics and elections

Trump Administration Priorities

1. Enhance national security and counter the threat of terrorism
2. Secure U.S. borders and enhance immigration enforcement and adjudication
3. Reduce violent crime and promote public safety
4. Combat opioid crisis by investigating producers and distributors of narcotics and illicit drugs
5. Promote rule of law, integrity, and good government

Details on DOJ Enforcement in 2020

Guidance on Evaluating Corporate Compliance Programs



- The updated “Evaluation of Corporate Compliance Programs” issued by the Criminal Division in June 2020 provides guidance to companies as they design, maintain, and evaluate their corporate compliance programs.
- Consistent with prior guidance, the Update addresses 12 compliance areas related to core elements of effective compliance programs.
 - The Update clarifies that prosecutors will consider these topics “both at the time of the offense and at the time of the charging decision and resolution.”
- The Update amplifies DOJ’s core themes: tailored, company-specific compliance programs enhanced by continuous inputs from the company’s real business experiences.
 - Companies should take note of these topics in evaluating the adequacy of their own compliance programs.

Three Fundamental Questions

1. “Is the corporation’s compliance program well designed?”
2. “Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?”
3. “Does the corporation’s compliance program work in practice?”

DOJ and FTC Under Biden Administration

Antitrust Enforcement



- President Biden designated Rebecca Slaughter as Acting Chair of the Federal Trade Commission.
- The new Antitrust Division leadership under the Biden Administration will pick up several antitrust cases brought in the waning days of the Trump Administration.
 - The Biden Administration will need to decide how to approach several antitrust lawsuits, including the Justice Department’s lawsuit against Google, which was filed in October.
 - In the final days of the Trump Administration, the Antitrust Division obtained its first criminal indictments in “wage-fixing” and “no-poaching” cases.
 - In December 2020, DOJ charged a former owner of a therapist staffing company with criminal wage-fixing for his alleged involvement in an employee wage-fixing conspiracy.
 - In January 2021, the Antitrust Division announced that a surgical outpatient services company had been charged with violating the Sherman Act for agreeing with its competitors not to solicit and hire each other’s senior-level employees.

Details on SEC Enforcement in 2020

Enforcement Actions and Policy Update



- The SEC brought 715 total enforcement actions in 2020, 405 of which were stand-alone enforcement actions.
- Standalone enforcement actions dropped 23% compared to FY 2019, lower than each of the five preceding fiscal years.
- This decline is likely attributable to COVID-19 and the challenges of mandatory teleworking. This number likely will rebound, including as the SEC possibly reopens offices in 2021.

Policy Update

As of February 2021, the SEC Enforcement Division will no longer recommend to the Commission that it accept settlement offers conditioned on receiving collateral consequences waivers (e.g., related to WKSI status, Rule 506 of Regulation D).

Enforcement Actions Filed in Fiscal Years 2015 to 2020

	FY 2020	FY 2019	FY 2018	FY 2017	FY 2016	FY 2015
Standalone Enforcement Actions	405	526	490	446	548	508
Follow-On Admin. Proceedings	180	210	210	196	195	167
Delinquent Filings	130	126	121	112	125	132
Total Actions	715	862	821	754	868	807

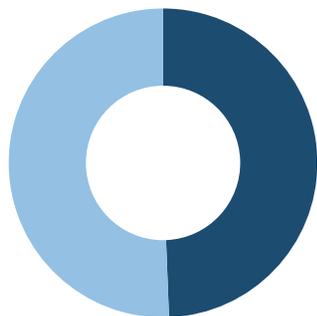
SEC Division of Enforcement 2020 Annual Report

Details on SEC Enforcement in 2020

Review of Key Focus Areas for SEC Enforcement

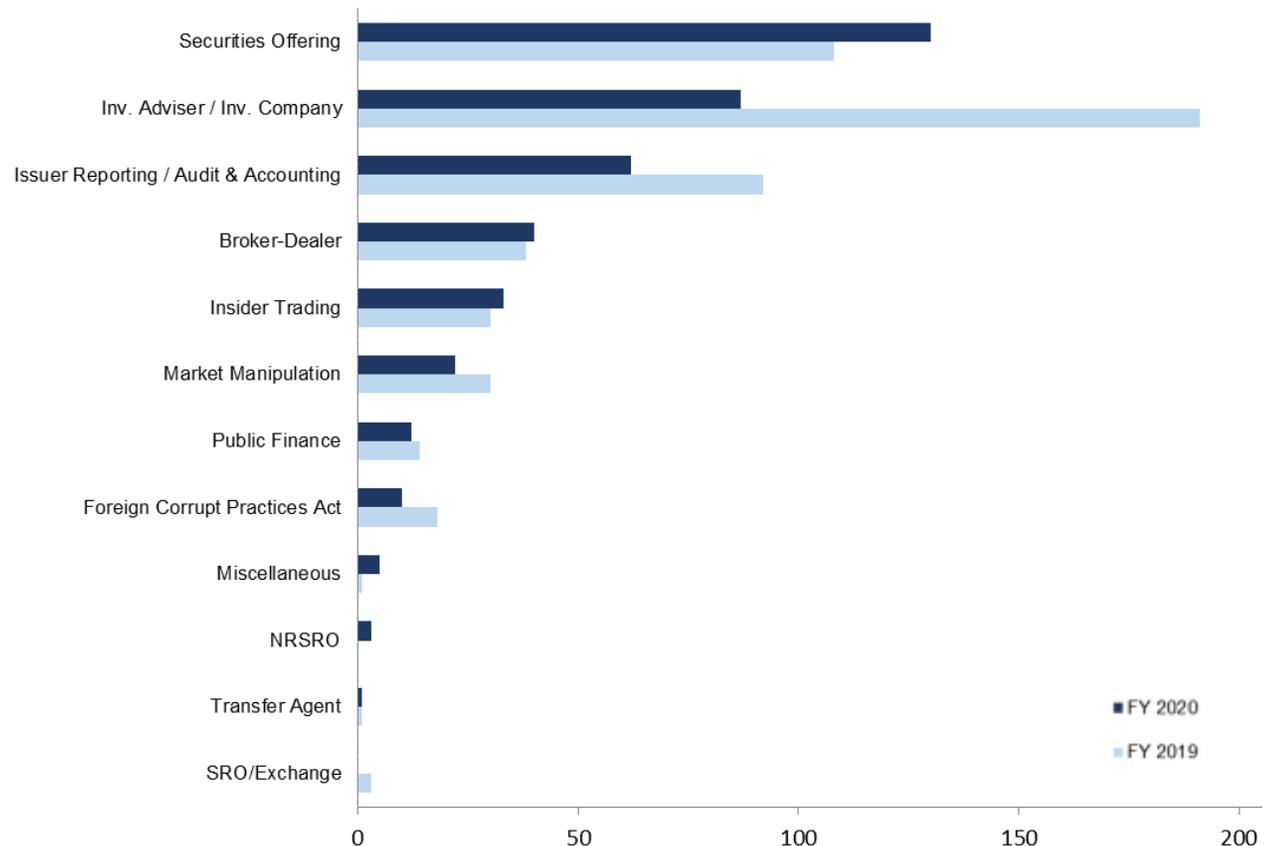


- The largest category of actions (32%) involved securities offerings, up from 21% in FY 2019.
- Cases against investment advisers accounted for 21%, down from 36% in FY 2019.
- Cases regarding public company financial reporting and disclosure were stable (15% in FY 2020, 17% in FY 2019).



■ Admin. Proceedings (Standalone)
■ Court Cases

Types of Cases (SEC Standalone Actions)



SEC Division of Enforcement 2020 Annual Report



Details on SEC Enforcement in 2020

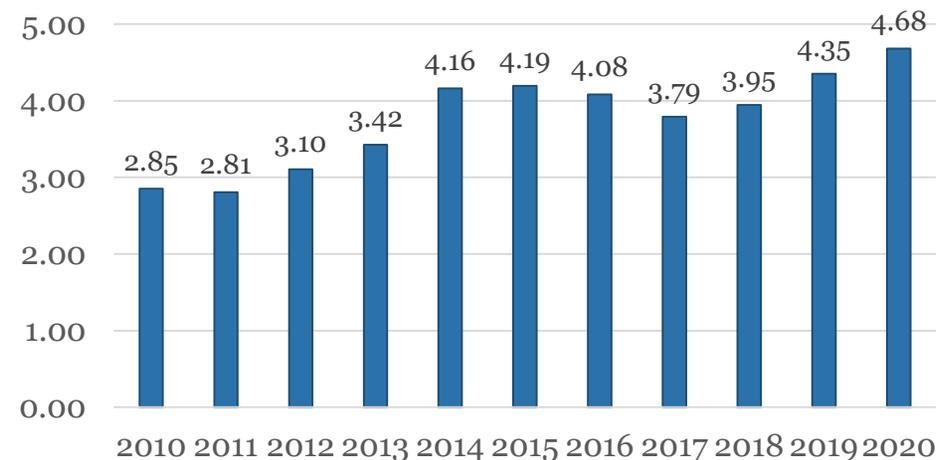
Penalties and Disgorgements

- 2020 was a record-breaking year for penalties and disgorgement despite a drop in overall cases.
- The SEC's \$4.68 billion in total penalties and disgorgements was an 8% increase over FY 2019.

–A substantial share was attributable to a June 2020 settlement with a messaging services company. The company was ordered to pay \$1.2 billion in disgorgement, but was credited in full for returning the same amount to investors that had purchased the company's unregistered digital tokens.

- In NDAA, Congress granted SEC explicit statutory authority to seek disgorgement in federal district court (responding to limiting decisions in *Liu v. SEC* and *Kokesh v. SEC*) subject to certain conditions.

SEC Penalties and Disgorgements
(in billions)



SEC Division of Enforcement 2020 Annual Report

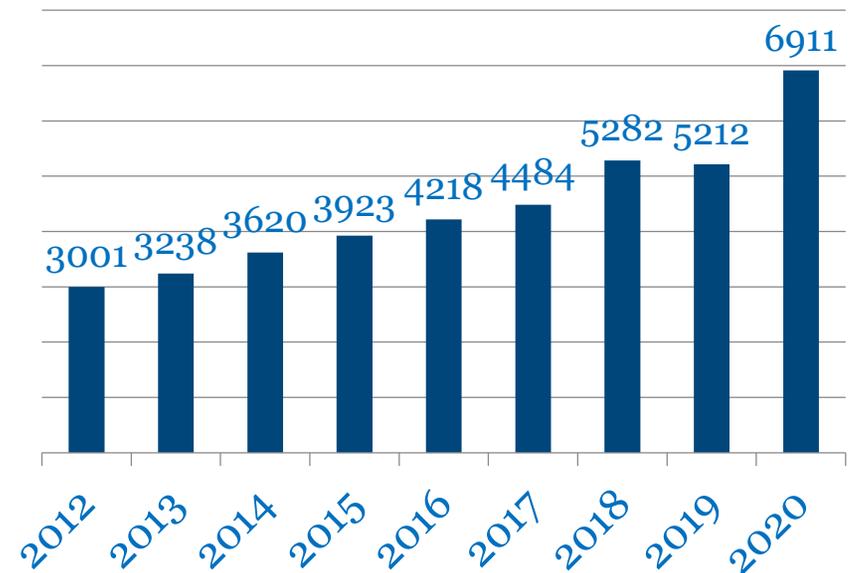
Details on SEC Enforcement in 2020

Whistleblower Update



- 2020 marked the ten-year anniversary of the SEC’s whistleblower program. Since its inception, enforcement actions attributed to whistleblower tips have resulted in more than \$2.5 billion in ordered financial remedies.
- 2020 was a record year for:
 - Tips received by OWB (6,911);
 - Number of whistleblower awards (39);
 - Total money awarded to whistleblowers (\$175 million); and
 - Largest single whistleblower award (\$52 million).

OWB Tips



SEC Whistleblower Program 2020 Annual Report to Congress

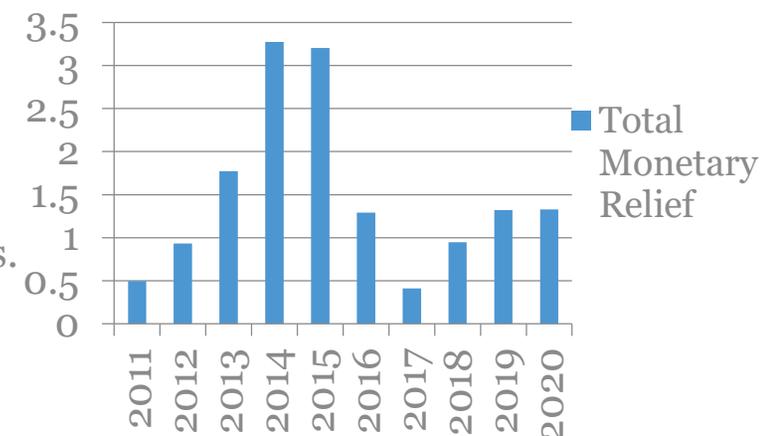
Details on CFTC Enforcement in 2020

Key Statistics and Trends



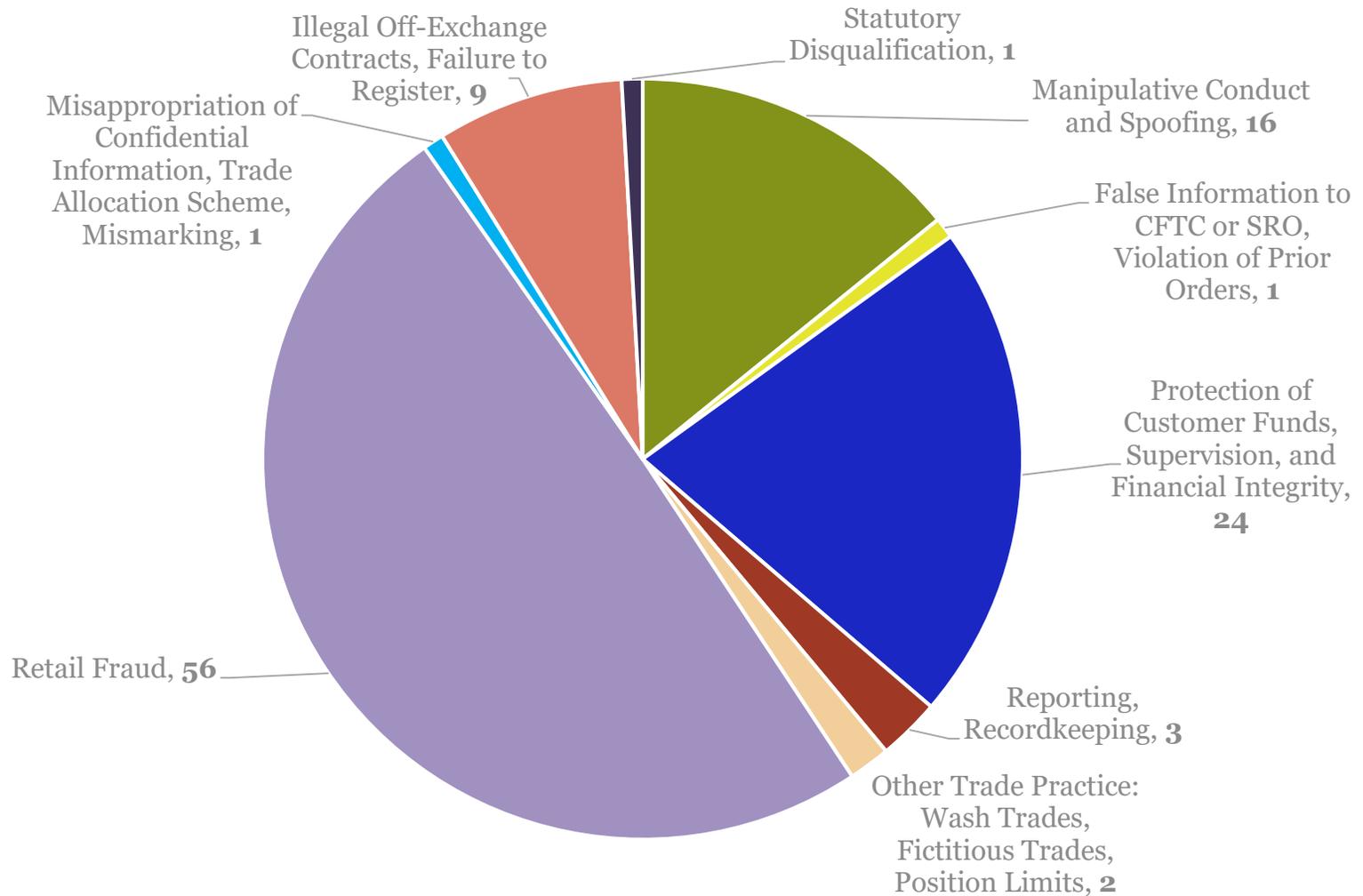
- Despite the COVID-19 pandemic, the CFTC had a record-breaking year in enforcement:
 - The agency filed 113 enforcement actions, more than in any other year in the agency’s history, and ordered a total of \$1,327,869,760 in monetary relief.
 - The CFTC obtained its largest monetary relief, \$920.2 million, through a resolution with JPMorgan relating to allegations of spoofing and deceptive conduct in precious metals and U.S. Treasury futures contracts.
 - The agency announced a settlement with Vitol Inc.—its first public action based on foreign corruption, which utilized an aggressive theory to pursue allegations of corruption through the CFTC’s historic ability to pursue fraud and manipulation.
 - The CFTC demonstrated an increased focus on AML enforcement, bringing several cases for violations of CFTC Regulation 42.2, which requires futures commission merchants and introducing brokers to comply with the BSA.
- For the first time since 1994, the CFTC issued guidance outlining the factors it considers in recommending civil monetary penalties.
- In September, the CFTC provided guidance on how it will assess compliance programs in enforcement matters.

**CFTC Recovery
(in billions)**



Details on CFTC Enforcement in 2020

2020 Enforcement Actions by Category



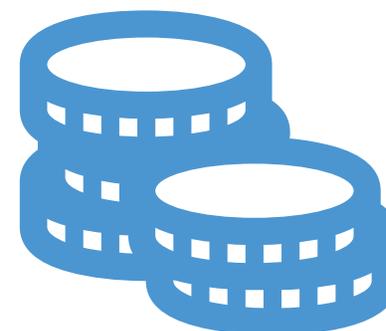
FinCEN Update



- FinCEN resolved two enforcement actions in 2020, including the first enforcement action brought against a Bitcoin “mixer” or “tumbler” for violating the Bank Secrecy Act.
- FinCEN issued a new statement on its approach to enforcing the Bank Secrecy Act and anti-money laundering regulations, providing a non-exhaustive list of factors it considers when determining how to address BSA/AML violations (previously discussed on slide 72).

“FinCEN is committed to being transparent about its approach to BSA enforcement. It is not a ‘gotcha’ game. The information required by the BSA saves lives, and protects our communities and people from harm. It is a national security issue.”

– Kenneth A. Blanco,
FinCEN Director
(Aug. 18, 2020)



PCAOB Update



- To assess the impact of the COVID-19 pandemic on audits, the PCAOB extended its audit inspection window in 2020 to cover five quarters instead of the typical four.
 - PCAOB Chairman William Duhnke explained that 2020 inspections would focus on how auditors plan for and respond to auditing risks relating to the COVID-19 pandemic.
 - The PCAOB anticipates reporting on its findings from the inspections in the first half of 2021.
- The PCAOB is “significantly” increasing the percentage of public-company audits that it randomly selects for inspection in 2021, though the total number of audit inspections conducted will remain about the same.
- In November 2020, the PCAOB amended its standards for assessing auditor independence to align with the SEC’s 2020 revisions to its auditor independence requirement from 2019.

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Building and Overseeing Effective Compliance

Global Convergence in Compliance Expectations

Core Elements of an Effective Program

Clear and concise policies

Tone from the Top

Periodic Risk Assessment

Sufficient Resources

Training & Guidance

Reporting & Investigation

Monitoring & Testing

Lessons Learned



Serious
Fraud Office

AFA
Agence Française Anticorruption



ICAC



Australian Government
AUSTRAC

Focus on Internal Audit

Sword and Shield

- Updated DOJ and SEC guidance emphasizes the corporate response to misconduct as a hallmark of effective compliance that will bear upon ultimate penalties imposed (if any).
 - Prompt remediation of identified issues can be a shield, evidencing a robust compliance program.
 - When management fails to act (adequately or at all), prosecutors may weaponize these audit findings—often contained in non-privileged reports—as evidence of a deficient program.
- Management must be ready and willing to act promptly to respond to problem areas identified by internal audits and other monitoring efforts.

DOJ/SEC Guidance in Practice:

- Several recent enforcement orders have commented on the corporate failure to respond to known risks raised initially by internal audits.
 - Novartis SEC Order (June 2020) referenced consecutive audits identifying necessary, significant improvements and quoted a senior executive on the unsuccessful remediation attempt.
 - Beam Suntory DPA (October 2020) described executives ignoring many of their audit findings, as well as the external reviews of two law firms.

Gatekeeper Liability Continues

- Regulators continue to penalize gatekeepers both for actively facilitating and for passively allowing compliance failures at their organizations.

- DOJ investigates and prosecutes compliance professionals for allegedly inappropriate facilitation of, or participation in, misconduct, and for failing to satisfy professional standards.

- Companies should ensure that gatekeepers receive appropriate guidance and training to be effective.

- In October, the D.C. Circuit upheld an SEC fine against the CCO of a broker-dealer in *North v. SEC*:

- CCO missed “clear red flags” that “should have led [him] to inquire” when a new hire sent \$150k to a barred broker’s firm.

- CCO had reviewed the invoices without flagging or reporting the relationship.

- Court dismissed CCO’s argument that reporting duties lie solely with the firm. Responsibility rather extends to “associated persons.”

“We have long recognized that individual accountability is critical to an effective enforcement program. Institutions act through their employees, and holding culpable individuals responsible for wrongdoing is essential to achieving our goals of general and specific deterrence and protecting investors by removing bad actors from our markets.”

– SEC Division of Enforcement, 2020 Annual Report

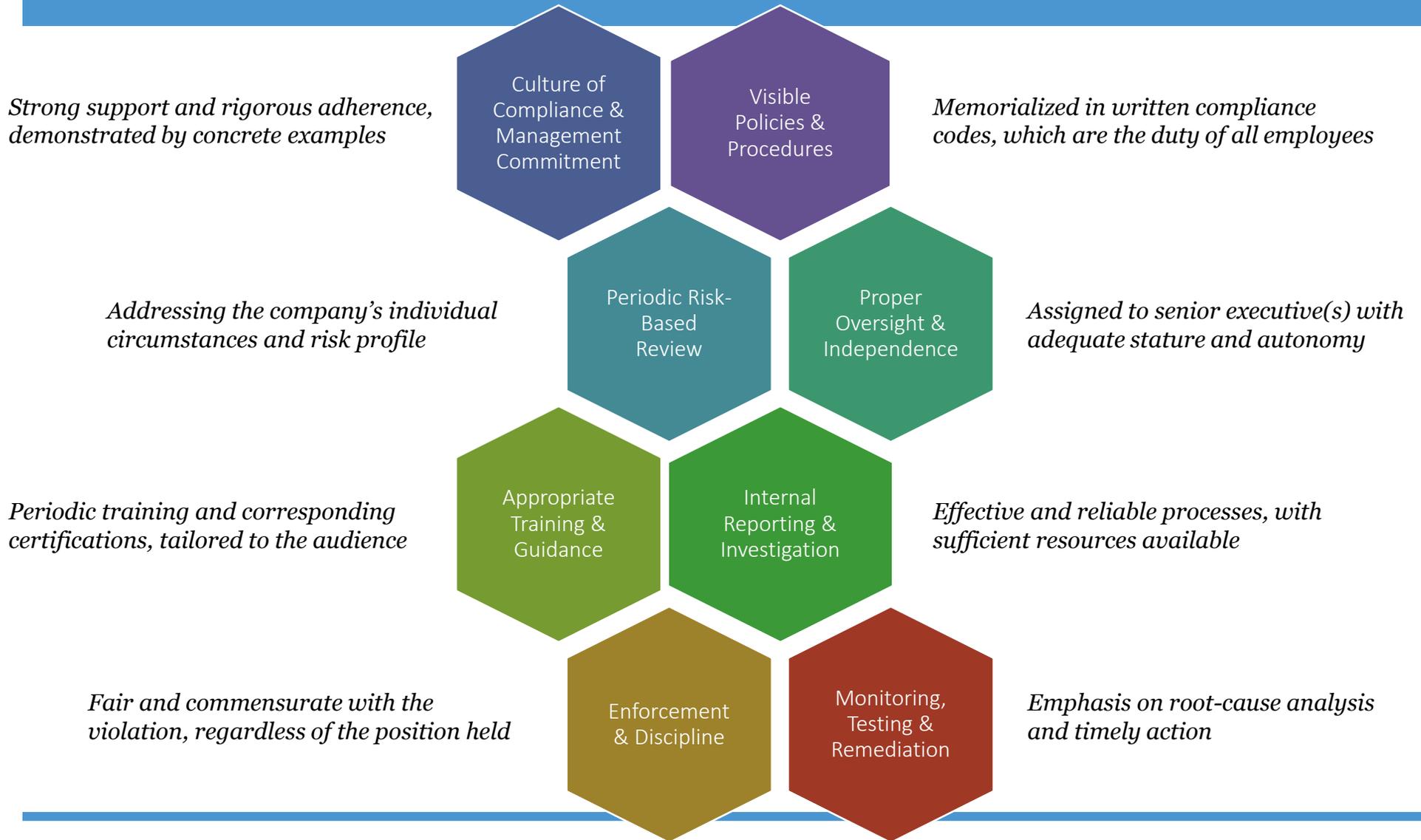
Practical Lessons from DOJ and SEC

Enforcing the Updated Guidance

- **Tailored, Risk-Based Compliance Programs:** Programs should be tailored to companies' unique risk profiles (i.e., type of business, geographic operations, business partnerships, etc.).
 - **FCPA Resource Guide:** Commits to an individualized assessment of compliance programs.
 - **DOJ Evaluation of Corporate Compliance Programs:** Emphasizes need for a flexible approach to evaluating compliance programs and confirms there is no “one-size-fits-all” solution.
- **Investigation, Analysis, and Remediation of Misconduct:** To avoid more significant penalties, companies must respond to problems identified in internal audits and compliance reviews and identify and address the root cause(s) of misconduct.
 - **FCPA Resource Guide:** “The truest measure of an effective compliance program is how it responds to misconduct.”
 - **DOJ Evaluation of Corporate Compliance Programs:** “Does the company review and adapt its compliance program based upon lessons learned from its own misconduct and/or that of other companies facing similar risks?”
- **Ongoing Compliance Enhancements:** Companies should proactively enhance their compliance programs, without waiting for investigation/resolution.
 - DOJ and the SEC evaluate the company's compliance program both at the time of the offense and at the time of resolution.
 - Recent resolutions declining to impose compliance monitors highlight companies' remedial measures, including expansion of compliance resources and implementation of data-driven testing.

Modified Attachment C

Stricter Expectations for the Corporate Compliance Program



CFTC Division of Enforcement: Updated Guidance

Agency Focus on Transparency and Predictability

Company Response	Result	CFTC Enforcement Order Language
None	No Recognition in Enforcement Order	N/A
No Self-Reporting, But Cognizable Cooperation and/or Remediation	Recognition, But No Reduction in Penalty	“[T]he Commission <u>recognizes the cooperation</u> of [Respondent] with the Division of Enforcement’s investigation of this matter [and] <u>acknowledges Respondent’s representations concerning its remediation</u> in connection with this matter.”
No Self-Reporting, But Substantial Cooperation and/or Remediation	Recognition and Reduced Penalty	“[T]he Commission recognizes the substantial cooperation of [Respondent] with the Division of Enforcement’s investigation of this matter [and] acknowledges Respondent’s representations concerning its remediation in connection with this matter. The Commission’s recognition of Respondent’s substantial <u>cooperation and appropriate remediation</u> is further reflected in the form of a <u>reduced penalty</u> .”
Self-Reporting, Substantial Cooperation and Remediation	Recognition and Substantially Reduced Penalty	“[T]he Commission recognizes the self-reporting and substantial cooperation of [Respondent] in connection with the Division’s investigation of this matter [and] acknowledges Respondent’s representations concerning its remediation in connection with this matter. The Commission’s <u>recognition of Respondent’s self-reporting, substantial cooperation, and appropriate remediation</u> is further reflected in the form of a <u>substantially reduced penalty</u> .”

Compliance Trends to Watch in 2021

- **Consolidating Compliance Expectations:** Regulators' compliance expectations are becoming increasingly aligned in certain areas (e.g., sanctions, national security, and FCPA), and this is likely to continue across the globe.
- **Gatekeepers:** Government authorities will continue to treat gatekeeper involvement in misconduct as an aggravating factor. Gatekeepers will be held liable for missing “clear red flags” and for failing to report violations.
- **Shifting Enforcement Priorities:** Expect officials in the new Biden Administration to soon announce their areas of increased focus. Stay apprised of litigation trends to anticipate emerging risk areas, and respond proactively.
- **Individualized Assessment:** With agencies moving away from one-size-fits-all requirements, compliance programs will need to be demonstrably effective and tailored to the company's individual risk profile.

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Upcoming Gibson Dunn Webcasts & Today's Panelists

Additional Resources

Recorded Webcasts *(Available for CLE Credit)*

[White Collar Enforcement Outlook 2021 – Sanctions/Export Controls, AML and Healthcare Fraud](#)

[FCPA 2020 Year-End Update](#)

[Privacy and Consumer Protection Enforcement under the Biden Administration](#)

[FCPA Trends in the Emerging Markets of Asia, Russia, Latin America, India and Africa](#)

[International Anti-Money Laundering and Sanctions Enforcement](#)

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