

## 2020 Q2 Report

The FCPA Clearinghouse’s quarterly report provides an overview of some of the more notable trends and statistics in FCPA enforcement activity to emerge during the first quarter of 2020.

### Enforcement Statistics

There are a number of different ways to define FCPA enforcement activity and to count the number of new actions initiated each year. The FCPA Clearinghouse does not advocate one counting methodology over another, but instead presents the data in a number of different ways so that users can make their own informed judgments. Because our counting methodologies rely on defined terms (which are denoted below in bold), we make those definitions available at the “[Definitions](#)” tab of the [About Us](#) page.

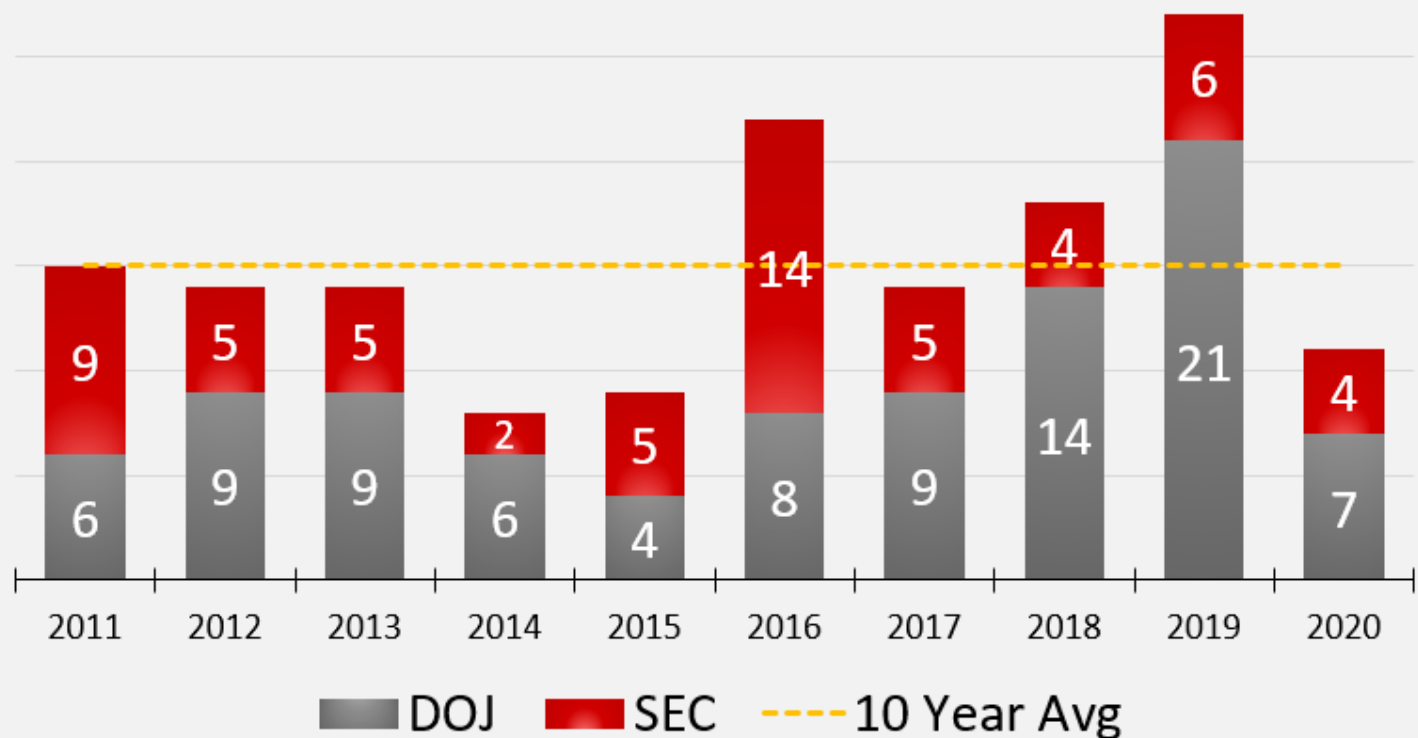
In the second quarter of 2020, the SEC filed three FCPA-related [Enforcement Actions](#), two against corporate defendants and one against an individual. The DOJ filed two new enforcement actions, both against corporations. Figure 1 shows all the enforcement actions filed, announced, or unsealed between April and June 2020.

**Fig. 1, FCPA-Related Enforcement Actions  
Initiated or Announced in Q2, 2020**

Case	Date Initiated	Investigation Disclosed?	Sanctions
<a href="#">SEC v. Asante K. Berko</a>	Apr. 13, 2020	No	Ongoing
<a href="#">In the Matter of Eni S.p.A.</a>	Apr. 17, 2020	Yes	\$24,500,000
<a href="#">In the Matter of Novartis AG</a>	June 25, 2020	Yes	\$112,800,000
<a href="#">US v. Alcon Pte Ltd</a>	June 25, 2020	Yes	\$8,925,000
<a href="#">US v. Novartis Hellas S.A.C.I.</a>	June 25, 2020	Yes	\$225,000,000

The second quarter of 2020 continued this year’s slower than average pace of FCPA-related enforcement activity. With eleven enforcement actions filed through the end of June, the first half of 2020 has seen the third slowest pace in enforcement activity in the last ten years. That level of activity is also below the ten-year average of 15 actions typically filed in the first six months of the year. Figure 2 compares the level of enforcement activity between January and June in each of the last ten years.

**Fig. 2, Half-Year Enforcement Actions per Year**



**Investigations**

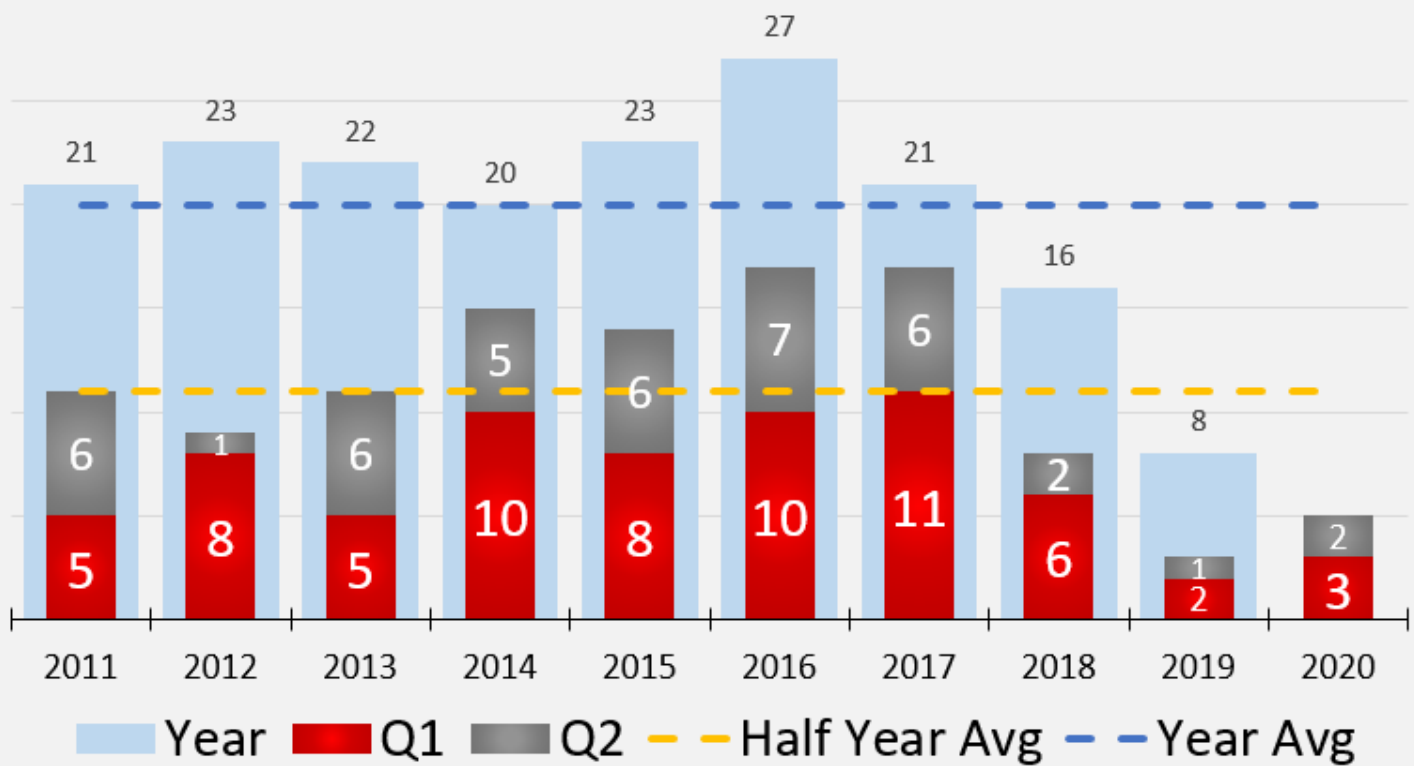
U.S. authorities are currently investigating at least 40 different entity groups for possible FCPA violations. Last quarter, two companies first disclosed new FCPA-related [Investigations](#) by the DOJ or SEC. However, in both cases, disclosure of an internal or foreign investigation pre-dated disclosure of the investigation by U.S. authorities. Prior to confirming the DOJ and SEC investigations in its annual report published in June, [Avianca Holdings S.A.](#) disclosed in February 2020 that the company had opened an internal investigation into potential FCPA-related misconduct connected to the company’s dealings with [Airbus SE](#), which settled its own FCPA-related enforcement action with the DOJ in January. Similarly, though [KT Corporation](#) first disclosed an SEC investigation in its annual report in April, that investigation derives from an investigation by Korean authorities spanning back to at least 2017. Figure 3 shows all entity groups that disclosed new FCPA investigations by U.S. authorities in the second quarter of 2020.

**Fig. 3, DOJ and SEC Investigations Disclosed in Q2 2020**

Company	Agency	Date Investigation Disclosed	Internal Investigation Disclosed?	Country/Region Investigated
<a href="#">KT Corporation</a>	SEC	Apr. 29, 2020	No	South Korea
<a href="#">Avianca Holdings S.A.</a>	DOJ, SEC	June 11, 2020	Yes	N/A

The number of companies disclosing new FCPA-related investigations by U.S. authorities in the first six months of the year has dropped significantly since 2017 and is well below the ten-year average. Figure 4 compares the number of investigations initiated by U.S. regulators in the first two quarters and full year for each of the last ten years.

**Fig. 4, Disclosed Half and Full Year Investigations by Year**



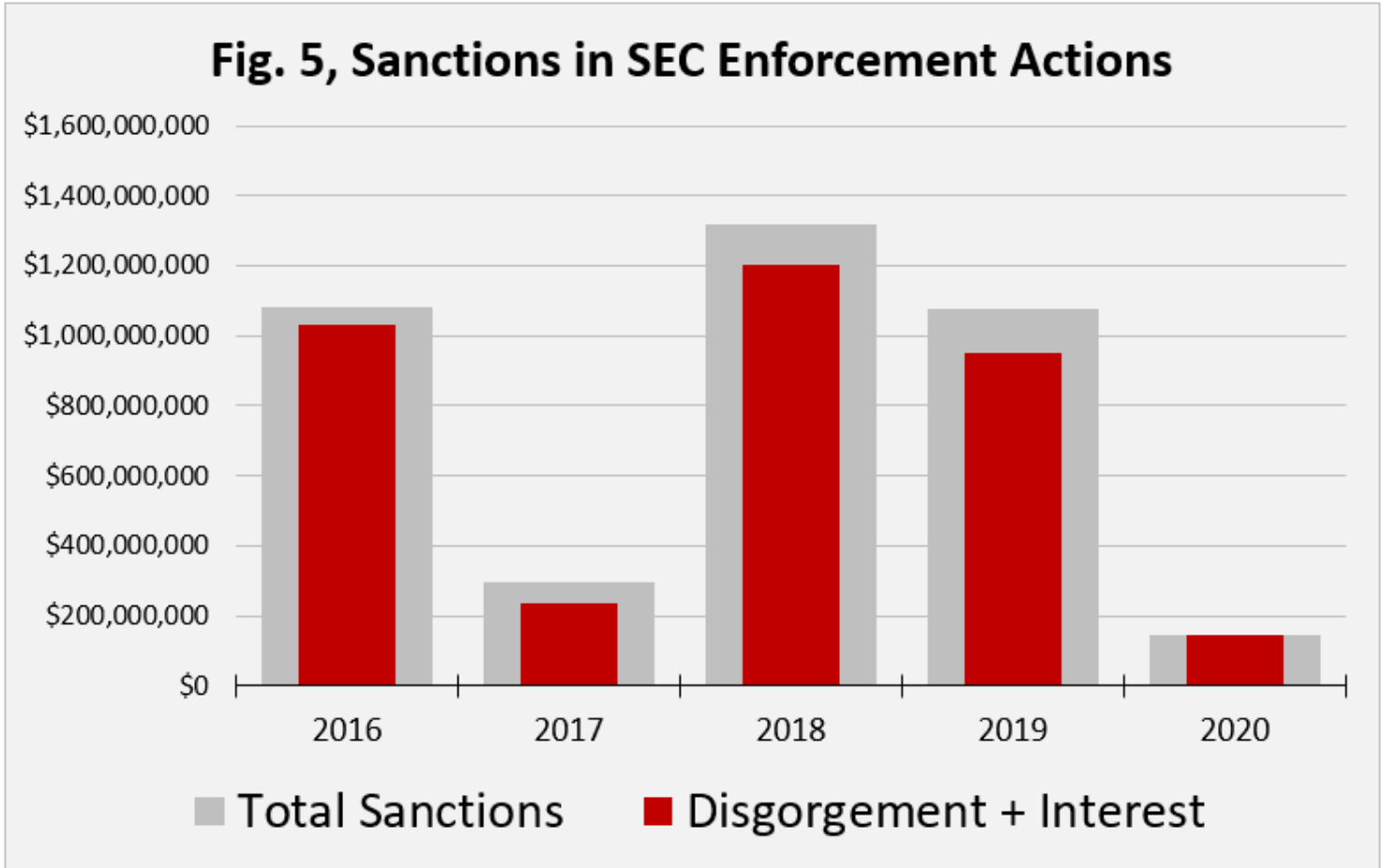
According to information disclosed in SEC filings and charging and settlement documents, U.S. authorities resolved six publicly-disclosed FCPA-related investigations involving four separate companies in the second quarter of 2020. The SEC resolved three open investigations into [Eni, S.p.A.](#) The SEC filed an enforcement action against Eni which resolved the agency’s investigation into the company’s alleged misconduct in [Algeria](#). (The DOJ concluded its investigation into Eni’s activities in Algeria in 2019.) At the same time, the SEC closed two separate investigations into Eni’s activities in [Nigeria](#) and [the Congo](#) without taking further action. The DOJ and SEC concluded their investigations into [Novartis AG](#), with both agencies filing enforcement actions on June 25. Both Eni and Novartis are repeat offenders. Eni first settled FCPA claims with the SEC in 2010 stemming from its subsidiary’s involvement in a four-company joint venture called [TSKJ](#). Novartis first settled FCPA claims with the SEC in 2016 arising from its subsidiaries’ misconduct in China. Both the DOJ and SEC informed [Usana Health Sciences, Inc.](#) that the agencies had concluded their investigations and did not intend to pursue any further action. Finally, the DOJ concluded its investigation into [Alexion Pharmaceuticals, Inc.](#) without pursuing further action. Alexion had accrued \$25 million in anticipation of a settlement with the SEC, which occurred on July 2 and will be covered in the Clearinghouse’s Third Quarter report in October.

**Liu v. SEC**

On June 22, the Supreme Court issued a decision in *Liu, et al. v. SEC*, No. 18-1501, that resolved the question left open in *Kokesh v. SEC*, 137 S. ct. 1635 (2017): whether and to what extent the SEC is authorized to seek disgorgement in federal court proceedings through its power to award “equitable relief” under 15 U. S. C. §78u(d)(5). In an 8-1 decision, the Court confirmed the SEC’s ability to seek disgorgement subject to certain constraints. First, the Court held that a statutory requirement that equitable relief must be “for the benefit of investors” generally means that funds must be returned to the victims. Second, the Court expressed doubt as to whether disgorgement may be sought against multiple individuals under a theory of joint and several liability. Finally, the Court held that disgorgement awards must be limited to the net profits from wrongdoing minus any legitimate business expenses, while carving out an exception when the “entire profit of a business or undertaking” results from the wrongful activity. In FCPA-related enforcement actions filed prior to *Liu*, the SEC had used

varying definitions of disgorgement, including net profits, revenue, ill-gotten gains, unwarranted benefits, or unjust enrichment, or had not defined the term at all.

Although *Liu* is not an FCPA case, the decision is highly relevant to the FCPA community. Recently, disgorgement plus prejudgment interest has become the dominant remedy sought by the SEC in FCPA enforcement actions, and in the past five years these awards have accounted for approximately \$3.6 billion out of a total of \$3.9 billion in imposed sanctions (or 91 percent). Figure 5 shows the sanctions attributable to disgorgement and interest compared to total sanctions in FCPA-related enforcement actions commenced by the SEC in the last five years.

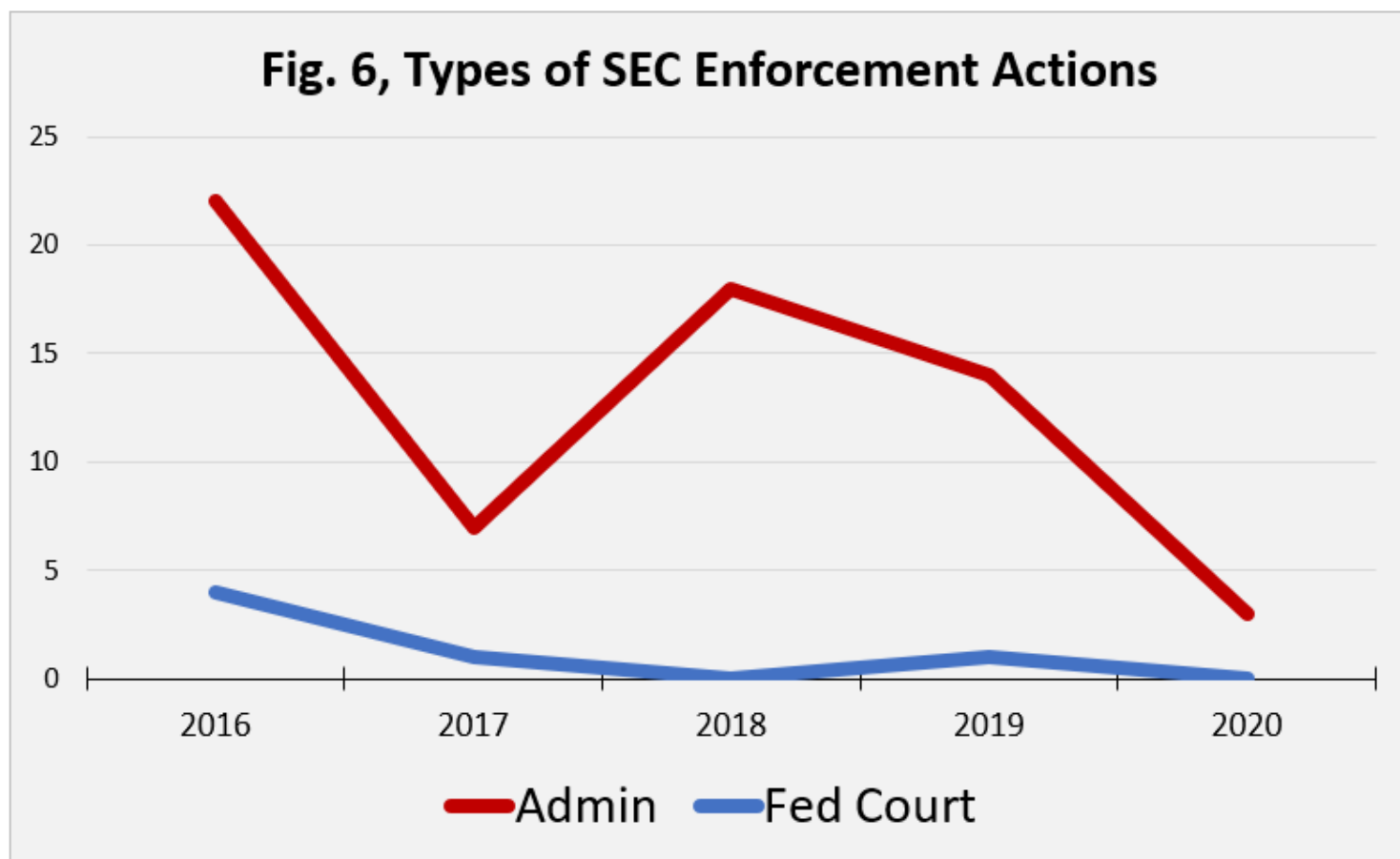


The *Liu* decision leaves several issues to be resolved by lower courts, including the question of who should receive the disgorgement award. In many FCPA cases, the SEC does not seek to distribute money to harmed investors, most likely because the Commission believes the cost of identifying victims, evaluating claims, and administering the distribution would outweigh the benefits of a distribution and result in very small payments to individual investors. Disgorgement awards are instead typically deposited in the U.S. Treasury. In *Liu*, the Court said that “it is an open question whether, and to what extent, [depositing disgorgement funds with the Treasury] satisfies the SEC’s obligation to award relief ‘for the benefit of investors’. . . .”

Another question left open by *Liu* is whether the Court’s new limitations on disgorgement apply in the administrative context as well as in federal court proceedings. In *Liu*, the Court expressly considered only the remedies available to the SEC in federal court pursuant to §78u(d)(5), which permits the SEC to seek civil penalties and “any equitable relief that may be appropriate or necessary for the benefit of investors.” See 15 U. S. C. §78u(d)(5). Nonetheless, a strong argument can be made for applying the limitations in both forums. In administrative proceedings, the SEC can seek limited civil penalties and “disgorgement.” See §77h–1(e). The majority in *Liu* notes that “Congress’ own use of the term ‘disgorgement’ in assorted statutes [including §77h–1(e)] did not expand the contours of that term beyond a defendant’s net profits—a limit established by longstanding principles of equity.” Moreover, and as Justice Thomas points out in his dissent, if the majority’s

new restrictions on disgorgement do not apply to administrative proceedings, “the result will be that disgorgement has one meaning when the SEC goes to district court and another when it proceeds in-house.”

If *Liu* applies to both federal court and administrative proceedings, the impact would be more significant. In recent years, the SEC has shifted most of its FCPA actions from federal court and into administrative proceedings before in-house judges. Figure 6 shows the forum in which the SEC has initiated FCPA enforcement actions over the last five years.



In the Novartis settlement, which was the first SEC action after the *Liu* decision, the SEC characterized the disgorgement amount as “unjust enrichment” and deposited the funds into the Treasury. However, the terms of the Novartis settlement were likely fully negotiated and agreed upon prior to the *Liu* decision. So whether *Liu* will actually impact FCPA enforcement activity remains to be seen. As long as corporate FCPA cases continue to be settled without judicial oversight, the SEC will continue to dictate the terms of those sanctions. While defense lawyers will invariably use the decision to seek deductions of legitimate business expenses and to reduce disgorgement awards, the SEC could seek higher penalties to compensate for this reduction. If the SEC is required to disburse disgorgement payments to harmed investors, then the impact to Treasury could be significant, as those funds are used to pay whistleblowers reporting securities fraud and to fund the activities of the Inspector General, among other things.

### COVID-19 Pandemic

Whether and how the COVID-19 pandemic will affect FCPA enforcement activity remains to be seen. Ascribing the current lull in enforcement activity to the pandemic would be premature, since FCPA enforcement often ebbs and flows. However, the pandemic has led to the closure of many courts and the suspension of in-person proceedings. As a result, judges have delayed hearings and other court proceedings in several FCPA-related actions. With more employees working remotely and many companies in crisis mode, oversight may be reduced and more FCPA-related misconduct may go undetected. At the same time, the SEC has [reported](#) an increase in whistleblower tips and complaints since the beginning of shelter-in-place orders, perhaps because potential

whistleblowers feel more liberated to inform regulators of possible misconduct when not under the careful scrutiny of bosses and coworkers. **Looking Ahead**

While the number of FCPA-related enforcement actions and investigations initiated in the first half of 2020 has been notably slower than average, several ongoing investigations appear close to resolution. In May, [Alexion Pharmaceuticals](#) disclosed a \$25 million accrual for an impending settlement, joining three other companies ([Herbalife Nutrition Ltd.](#), [John Wood Group plc](#), and [World Acceptance Corp.](#)) that disclosed accruals in the first quarter of 2020. The SEC announced an enforcement action against Alexion on July 2. That enforcement action will be covered in the next quarterly report. While none of these accruals could be described as predicting blockbuster settlements, at least one company, [Herbalife Nutrition Ltd.](#), appears ready to settle with both the DOJ and SEC for in excess of \$100 million.

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