Stanford Law School
Foreign Corrupt Practices Act Clearinghouse
a collaboration with Sullivan & Cromwell LLP

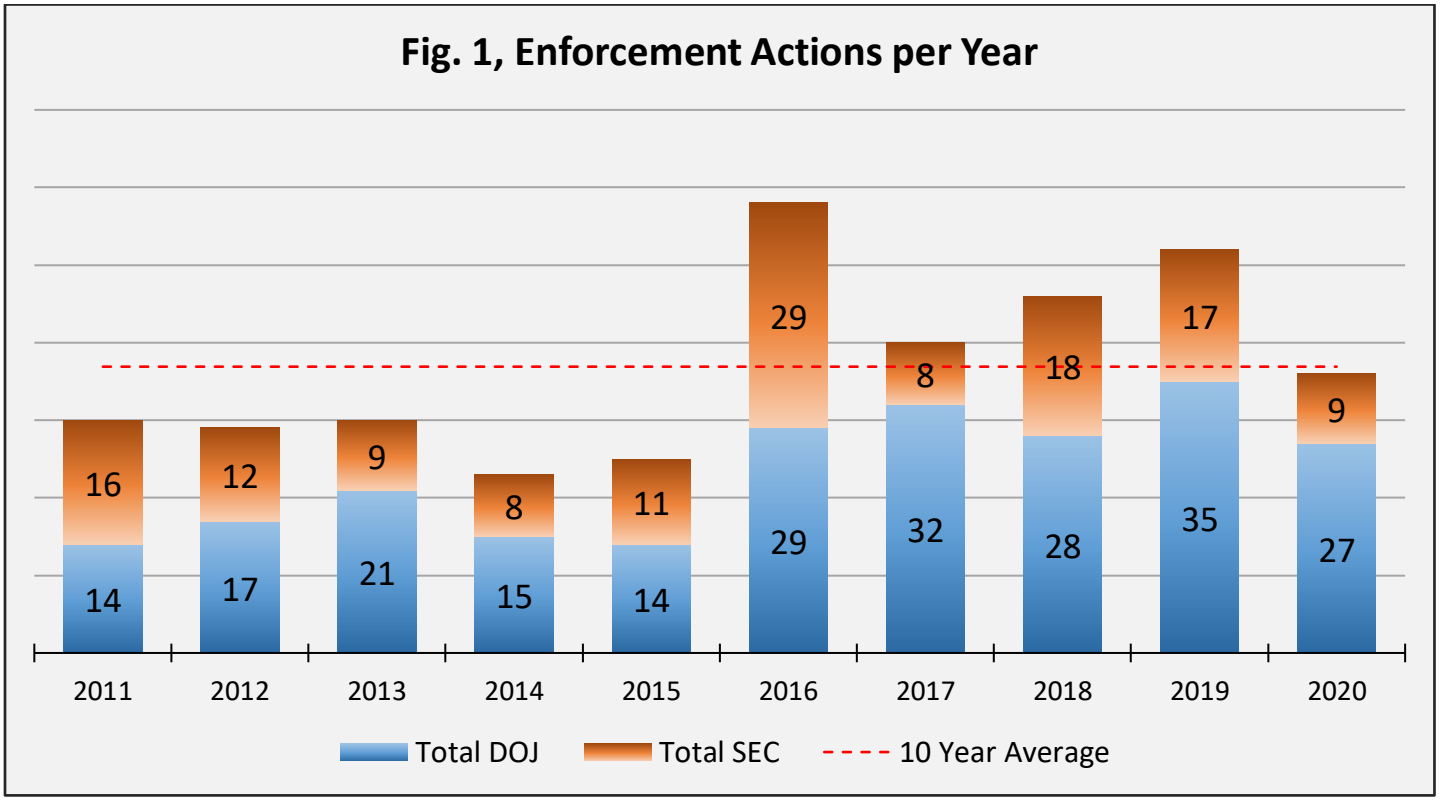
2020 FCPA Year in Review

The FCPA Clearinghouse's 2020 Year in Review provides an overview of some of the more notable trends and statistics to emerge from last year's FCPA enforcement activity.

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.

The DOJ and SEC filed 36 enforcement actions in 2020. This number is just under the ten-year average and well below the level of activity seen in recent years. In fact, the SEC initiated only slightly more than half as many cases in 2020 as it did in either of the prior two years. Figure 1 presents the number of **Enforcement Actions** filed per year for each of the last ten years. For purposes of these analytics, we treat declinations with disgorgement pursuant to the DOJ's Revised Corporate Enforcement Policy as enforcement actions.



The drop in enforcement activity contributed to a drop in **FCPA Matters**, which are groups of related enforcement actions that share a common bribery scheme. The number of FCPA Matters initiated in 2020

declined by almost 50 percent compared to 2019. Figure 2 presents the number of FCPA Matters initiated per year for each of the last ten years.

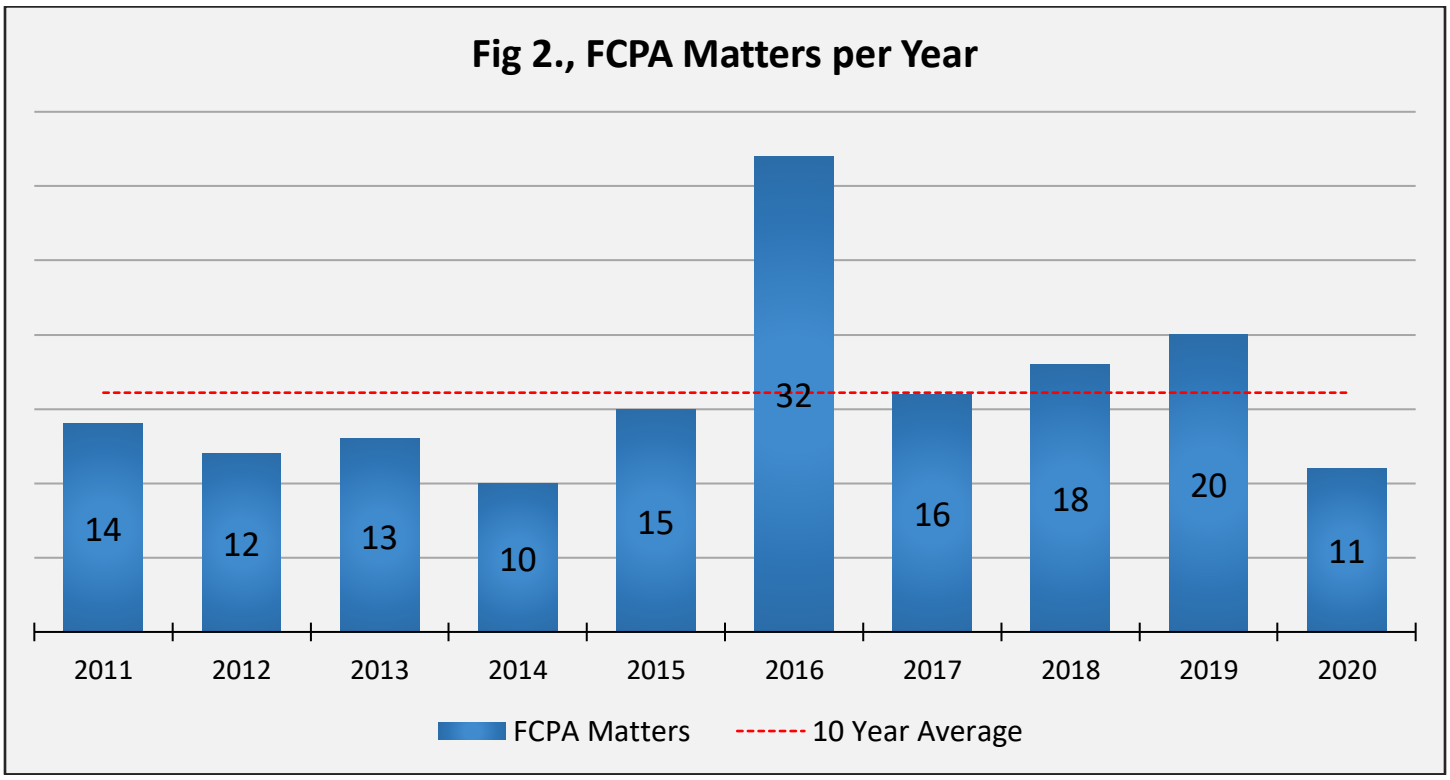
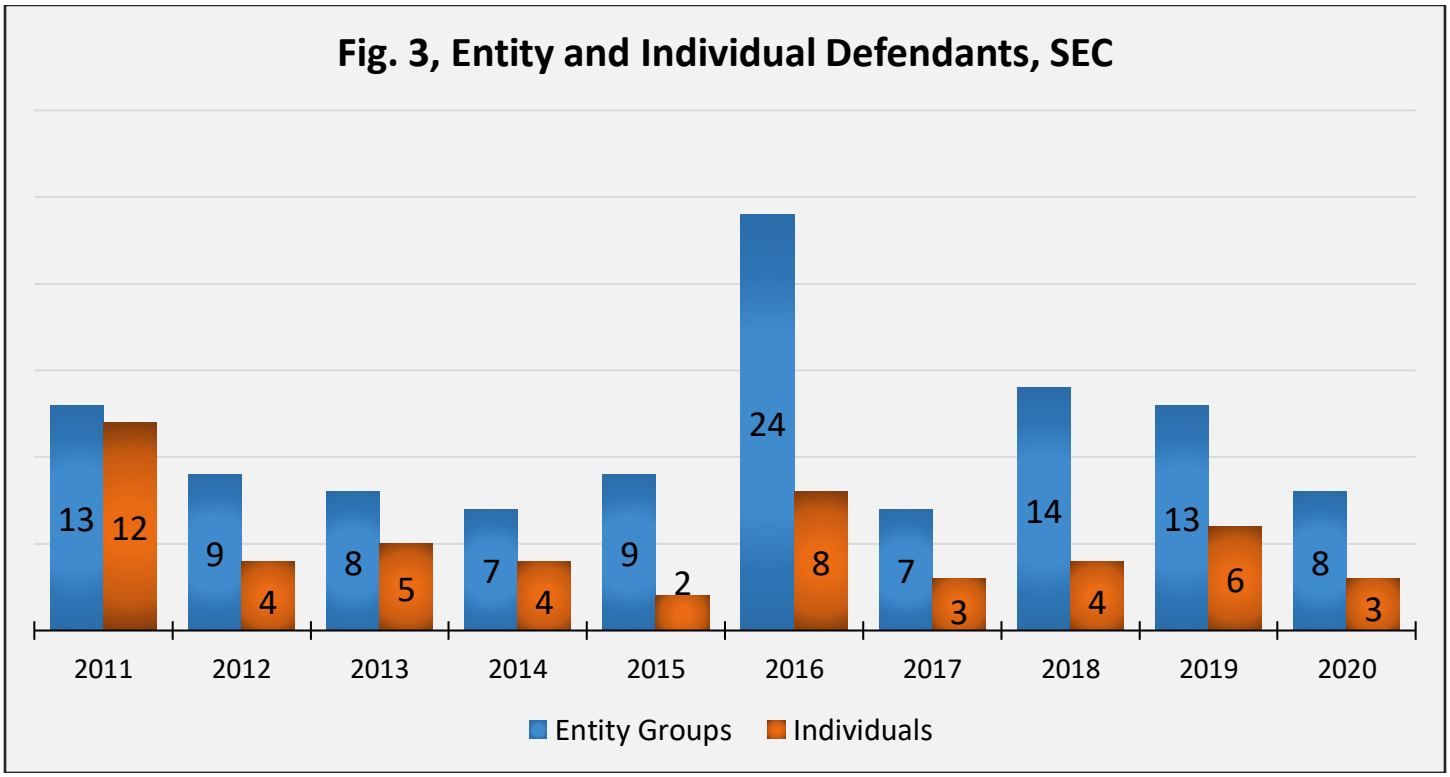
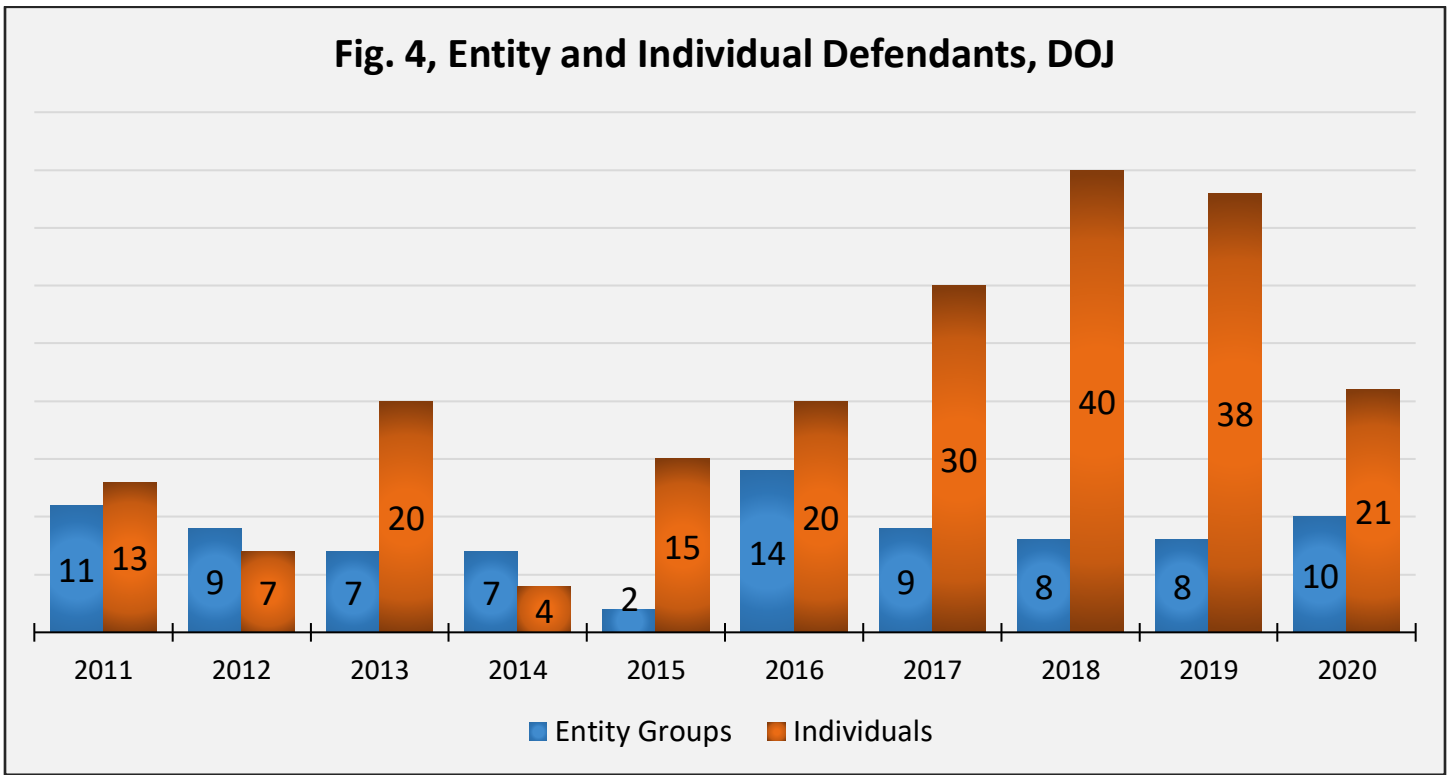


Figure 3 depicts the number of **Entity Groups** and individuals subject to FCPA-related enforcement activity by the SEC over the last ten years, and Figure 4 depicts the number of entity groups and individuals subject to FCPA-related enforcement activity by the DOJ over the last ten years. In 2020, the SEC sued eight entity groups and three individual defendants for FCPA-related violations, while the DOJ charged 10 entity groups and 21 individual defendants.





The number of individuals criminally prosecuted by the DOJ for FCPA-related offenses decreased significantly between 2019 and 2020, but the decrease comes on the heels of three years of exceptionally high levels of enforcement against individual defendants. The DOJ has emphasized in recent years that it is especially interested in prosecuting the individuals responsible for corporate misconduct. However, like in 2019, the vast majority of individuals criminally charged with FCPA-related offenses in 2020 (15, or 71 percent) appear to be connected to small or privately held companies with no parallel DOJ enforcement actions, rather than to the large companies that account for the most significant FCPA violations and fines. Many of these individuals have been charged in wide-ranging investigations into corruption at Venezuela's state-owned oil company and the Ecuadorian insurance industry.

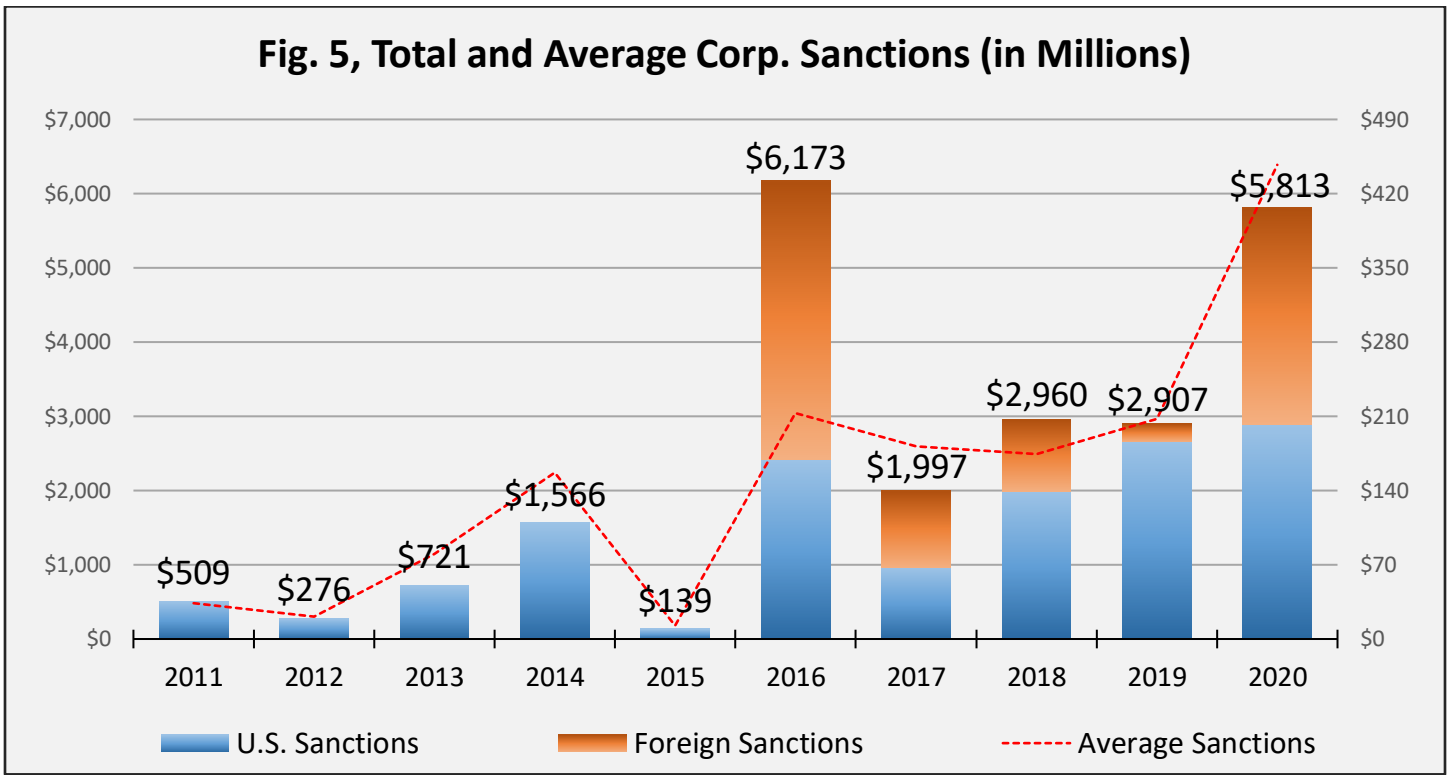
Of the six remaining individual defendants charged by the DOJ in 2020, only one – Javier Aguilar – worked directly for a company that was also prosecuted by the DOJ. The remaining individuals were either third-party intermediaries or agents to the bribery scheme or the foreign officials who accepted bribes. Nonetheless, because enforcement actions against individual defendants often occur well after the related enforcement actions against entities, additional prosecutions could be forthcoming. For example, the DOJ charged the Linares brothers for their alleged role in the Odebrecht bribery scheme four years after the company pled guilty.

Appendix 1 to this report provides a list of all FCPA-related enforcement actions initiated in 2020, as well as a few actions that were announced in 2020 but initially filed under seal in prior years. The latter actions are noted here for reference only; they are not included in the 2020 annual statistics.

Sanctions

Sanctions skyrocketed in 2020 despite the decline in enforcement activity. Last year, U.S. regulators imposed over $5.8 billion in sanctions against corporations in FCPA-related enforcement actions, double the prior year and the second highest total sanctions imposed by U.S. regulators in FCPA history. This amount includes sanctions imposed by the U.S. but owed to foreign regulators pursuant to global resolutions or parallel foreign actions. The average global sanction imposed on entity groups ($447 million) was the highest in FCPA history and more than double the previous high reached in 2016. Figure 5 shows the total and average sanctions

imposed on entity groups in FCPA-related enforcement actions, including amounts imposed by the SEC or DOJ that were ultimately owed to foreign regulators.



As in prior years, government regulators imposed the overwhelming majority of sanctions on just a handful of companies in 2020. Indeed, approximately half of the entity groups that resolved FCPA-related enforcement actions last year account for over 98% of the total sanctions imposed, and two of those, Airbus SE ($2.1 billion) and The Goldman Sachs Group ($2.6 billion), alone accounted for 81 percent of the total. The other five companies that paid more than $100 million in sanctions in 2020 are Novartis AG ($338 million), J&F Investimentos S.A. ($283 million), Vitol Holding B.V. ($135 million), Herbalife Nutrition Ltd. ($123 million), and Deutsche Bank ($123 million).[1]

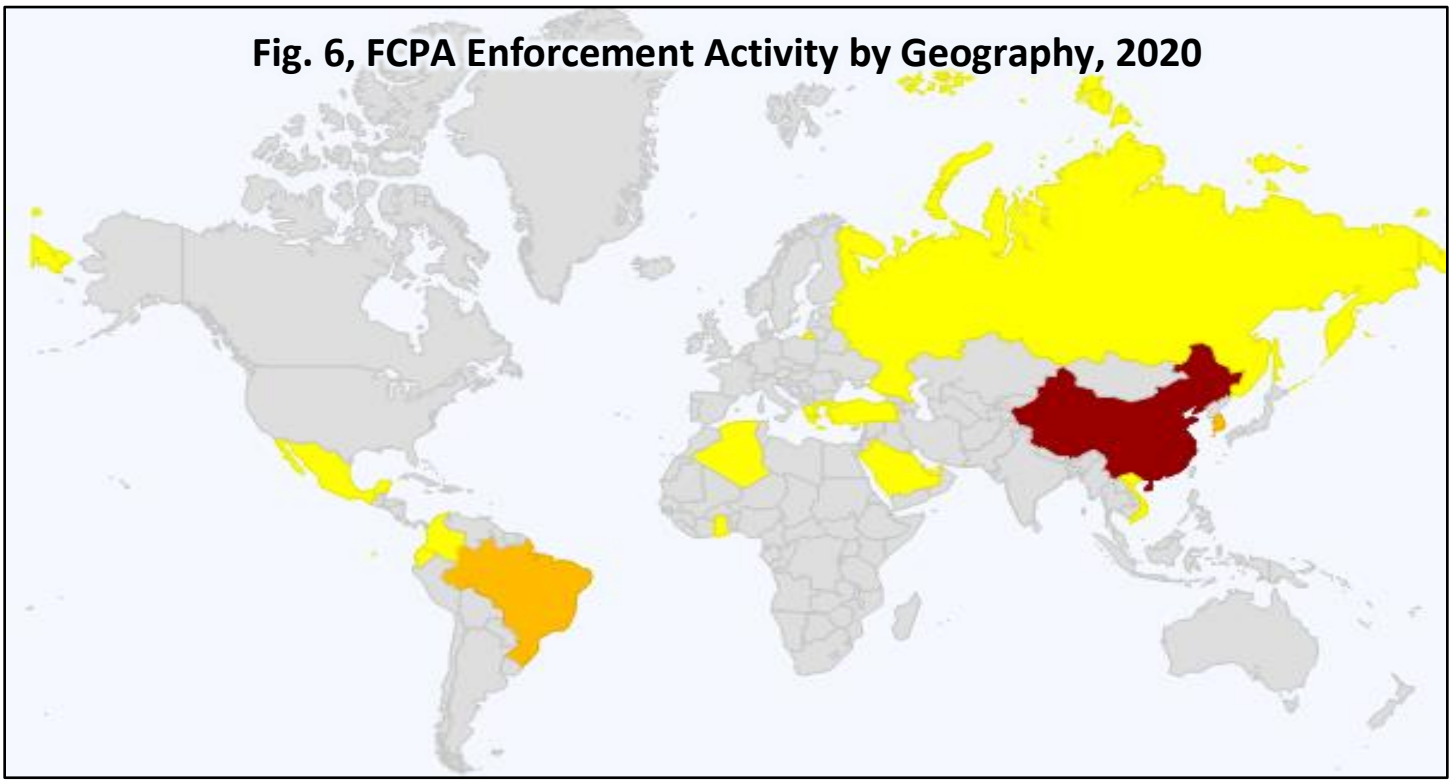
Though U.S. authorities continued to cooperate closely with officials in other countries to pursue their anti-corruption agenda, the number of enforcement actions that noted foreign assistance dropped in 2020 to 26 percent compared to 38 percent in 2019 and 52 percent in 2018. But unlike last year, the cases involving foreign assistance tended to result in the largest settlements of 2020. Four of the five largest FCPA settlements from last year noted foreign assistance.

Geography

The FCPA Clearinghouse identified 19 common bribery schemes among the 36 enforcement actions filed in 2020. China again took the top spot as the country most frequently implicated in FCPA-related bribery schemes resulting in enforcement actions, with four separate schemes. Brazil and South Korea tied for second place with two schemes each. When examined by region, Asia was most frequently implicated in FCPA-related bribery schemes, while Africa dropped from the top spot in 2019 to last place — tied with Europe — in 2020. The

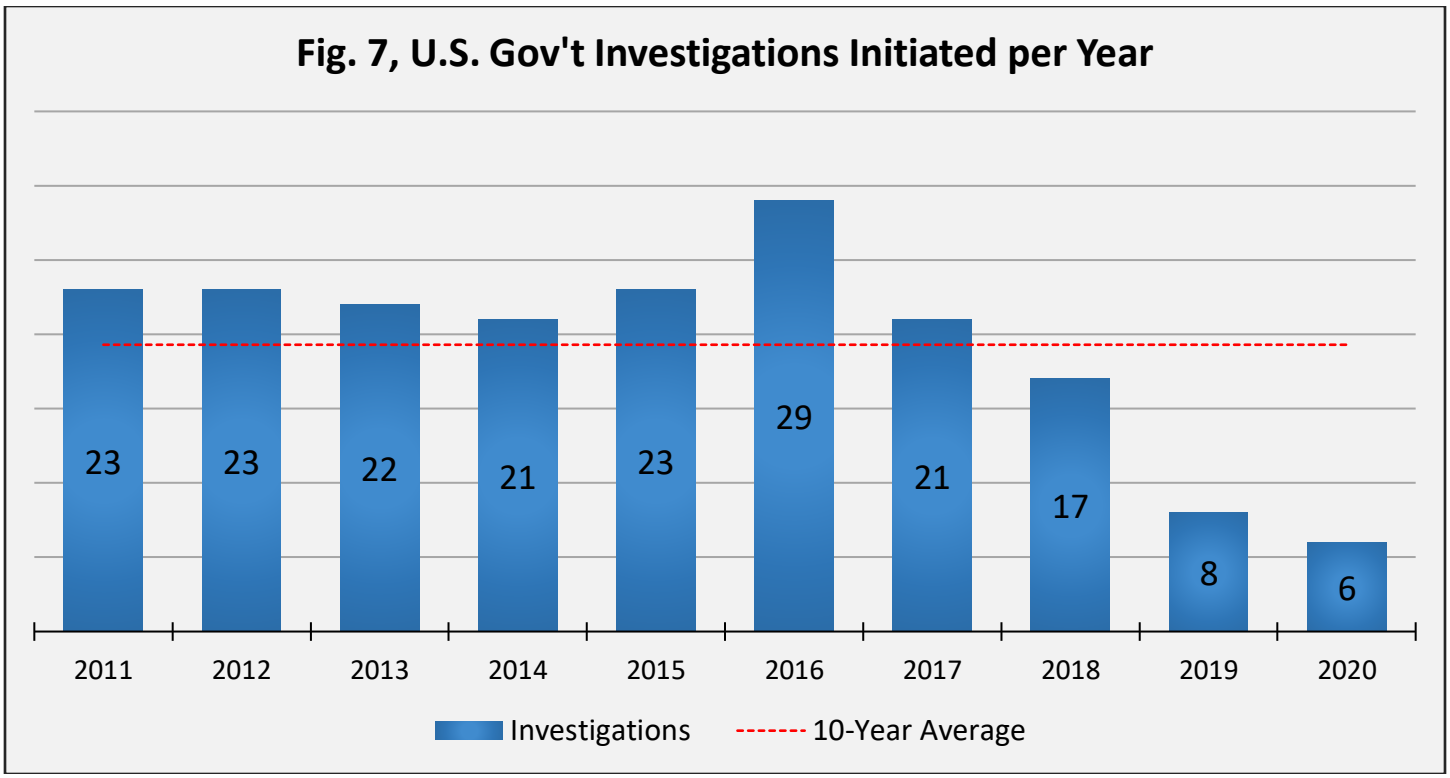
[1] Though the enforcement actions against Deutsche Bank were not announced until January 8, 2021, the DOJ filed its action on December 22, 2020. Properly attributing sanctions in FCPA actions against corporate defendants can be complex, particularly when one agency brings an enforcement action in one year and another agency brings one in a different year. For simplicity, the Clearinghouse attributes the entirety of the sanctions levied against a corporation in the year in which the earliest enforcement action was filed in its related FCPA Matter. Thus, the entirety of Deutsche Bank's $123 million sanction is attributed to 2020, despite the fact that the SEC levied its sanctions in an enforcement action initiated in 2021.

regional rankings for 2020 are as follows: Asia (7), Latin America (5), the Middle East (3), Europe (2), and Africa (2). Figure 6 shows all the countries implicated in FCPA enforcement actions in 2020.



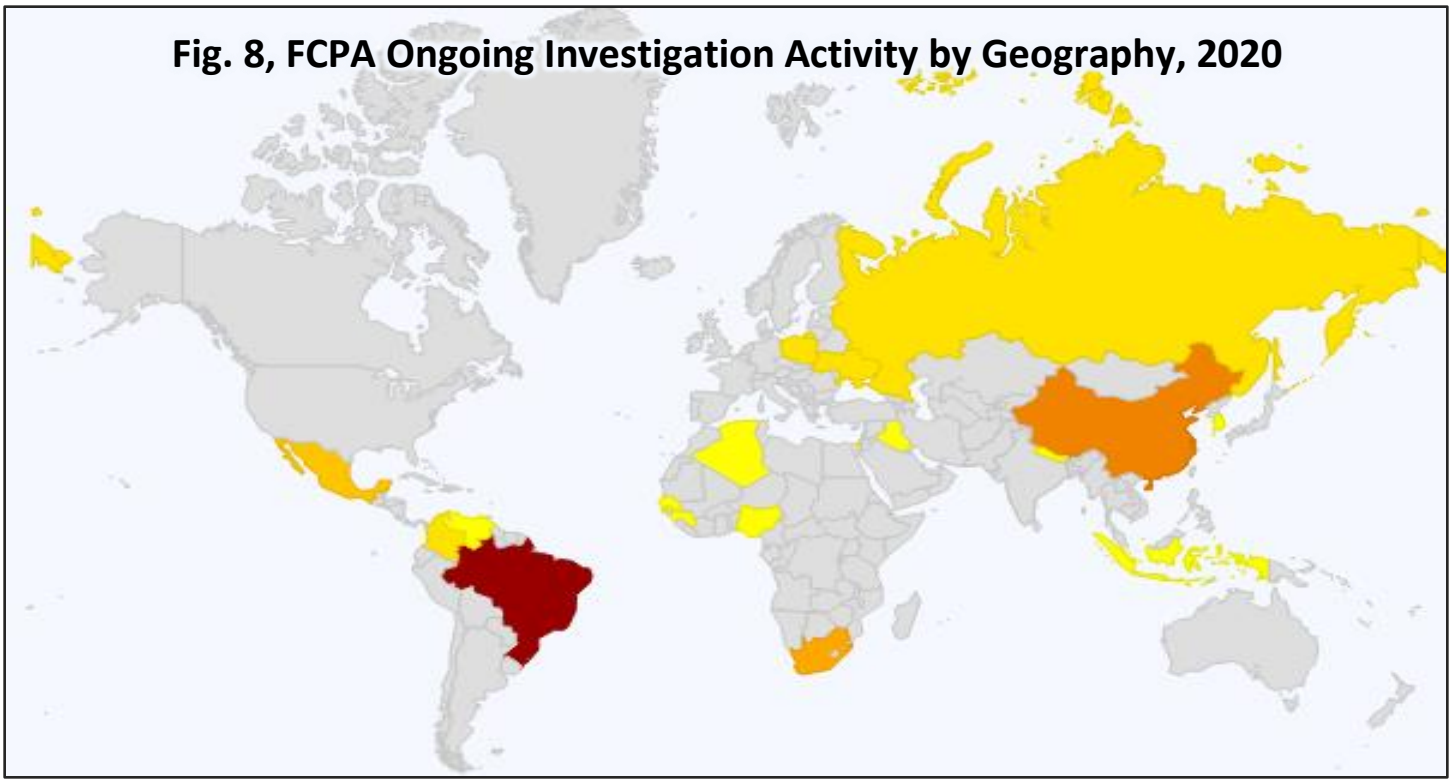
Investigations

Only six companies disclosed in their SEC filings a new FCPA-related **Investigation** commenced by U.S. authorities in 2020. This number continues a downward trend in disclosed investigations that began in 2018. In the ten years prior to this decline, an average of 22 companies had disclosed new FCPA investigations by the SEC or DOJ each year, a level which has not been matched or exceeded since 2016. By way of comparison, 21 companies disclosed new investigations in 2017, 17 did so in 2018, and only eight in 2019. As of the close of 2020, at least 38 companies appear to be the subject of ongoing FCPA-related investigations by the SEC and/or DOJ. Figure 7 shows the number of FCPA investigations initiated by the U.S. government in each of the last ten years.



Because information about FCPA-related investigations is typically disclosed in periodic reports filed with the SEC by public companies and others, the recent decline in the number of publicly held companies in the United States could impact the number of disclosed investigations, though the decline in disclosed FCPA-related investigations has outpaced the decline in publicly held companies. The decline could also reflect the enforcement policies and priorities of President Trump, who has made clear his disdain for the FCPA.

The three countries most frequently cited in connection with ongoing FCPA-related investigations in 2020 remain the same as in 2019. Brazil tops the list, with at least eight companies disclosing investigations into possible FCPA-related misconduct in Brazil. China ranks second with five, and South Africa is third with four investigations. Figure 8 shows the countries implicated in ongoing FCPA-related investigations as of the close of 2020.



According to information disclosed in SEC filings and other public documents, last year 15 entity groups disclosed that either the SEC, DOJ or both agencies had resolved investigations into potential FCPA violations by the companies. The SEC resolved seven publicly-disclosed investigations by enforcement action and closed at least four investigations without taking further action.

The DOJ also resolved seven publicly-disclosed investigations by enforcement action last year, including one declination pursuant to the DOJ's FCPA Corporate Enforcement Policy. The DOJ concluded eight investigations without pursuing any further action.

Appellate Opinion in United States v. Ho

On December 19, 2020, the U.S. Court of Appeals for the Second Circuit upheld the conviction of Chi Ping Patrick Ho who was convicted of FCPA and money laundering violations in 2018 for orchestrating and executing two bribery schemes to pay officials in Chad and Uganda in exchange for business advantages for CEFC China, a Shanghai-based multibillion-dollar conglomerate. At the time of the misconduct, Ho was the secretary-general of the China Energy Fund Committee ("CEFC NGO"), a non-governmental organization (NGO) based in Hong Kong that in turn funded a non-profit U.S entity, China Energy Fund Committee (USA) Inc. (the "U.S. NGO"), which was incorporated in Virginia. CEFC NGO was funded by CEFC China.

With regard to the FCPA, the Second Circuit held that evidence introduced at trial was "more than sufficient" to prove that Ho acted on behalf of a domestic concern – the U.S. NGO – to "assist it in obtaining business for CEFC Energy." The court was not swayed by Ho's argument that the U.S. NGO was not the ultimate object of his assistance, noting that "the statute precludes officers and directors of domestic concerns from paying bribes to foreign officials 'in order to assist such domestic concerns in obtaining…business *for*…*any* person.' 15 U.S.C. § 78dd-2(a) (emphasis added)."

The Second Circuit also rejected Ho's claim that 15 U.S.C. § 78dd-2 (prohibiting bribes by domestic concerns) and 15 U.S.C. § 78dd-3 (prohibiting bribes by persons other than issuers or domestic concerns) are mutually exclusive. The Court held that "[n]othing in the language of the statute, or *Hoskins* [902 F.3d 69 (2d Cir. 2018)],

prevents an individual from fitting within more than one of those…categories, particularly where, as here, that individual acts on U.S. soil on behalf of both domestic and foreign entities."

The court further rejected Ho's claim that a wire transfer, which takes advantage of U.S.-based correspondent accounts to conduct a dollar-denominated transaction, is barred from coverage under the money laundering statute. The court's holding could support the government's broad interpretation of the FCPA's jurisdictional reach by validating application of the statute to bribery payments that pass through U.S. banks, even where the United States is not the final destination.

Update to the FCPA Resource Guide

On July 3, the SEC and DOJ released the second edition of the Resource Guide to the US Foreign Corrupt Practices Act (the "updated Guide"). Most of the revisions reflect new settlements, judicial decisions, and updates to stated enforcement policies rather than a fundamental rethinking of the law or its enforcement. Some of the key changes are noted below:

- The updated Guide clarifies that a domestic concern includes any company that is organized or headquartered in the United States "other than an issuer," reflecting the government's apparent belief that §78dd-1 of the anti-bribery provisions would apply to a company that qualifies as both an issuer and a domestic concern.

- Despite the recent decision in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018), the updated Guide continues to assert that under "normal principles of conspiracy liability," foreign companies and individuals may be liable for conspiring to violate the FCPA even if they could not be independently charged with a substantive FCPA violation. The Guide grants that, "at least in the Second Circuit," an individual not directly covered by the FCPA's anti-bribery provisions cannot be guilty of conspiring to violate, or aiding and abetting a violation of the anti-bribery provisions, but notes that *Hoskins* does not limit conspiracy or aiding and abetting liability for the FCPA's accounting provisions, and that at least one court outside of the Second Circuit has rejected the reasoning of *Hoskins*. These observations suggest that the DOJ may continue to exert broad theories of accomplice and conspiracy liability against foreign nationals for violations of the FCPA's anti-bribery provisions, at least outside of the Second Circuit.
- Consistent with the Supreme Court decisions in *Kokesh v. SEC*, 581 U.S. ___; 137 S. Ct. 1635 (2017), and *Liu v. SEC*, 591 U.S. ___ (June 22, 2020), the updated Guide states that the civil disgorgement remedy is subject to a five-year statute of limitations and that "disgorgement is permissible equitable relief when it does not exceed a wrongdoer's net profits and is awarded for victims." However, since the publication of the updated Guide, Congress passed the 2021 National Defense Authorization Act, which expressly granted the SEC the authority to seek disgorgement for violations of federal securities laws, and doubled the statute of limitations for disgorgement awards and other equitable remedies in certain fraud-based cases from five years to 10 years. The newly added disgorgement provision does not expressly require that the relief be awarded for victims.

- Also in light of the ruling in *Kokesh*, the updated Guide confirms that the limitations period for criminal violations of the FCPA's accounting provisions is six years.
- The updated Guide clarifies the *mens rea* standard for corporate criminal liability under the accounting provisions, indicating that criminal liability can be imposed on companies and individuals for "knowingly and willfully" failing to comply with the FCPA's books and records or internal controls provisions.

- The updated Guide incorporates factors first introduced by Assistant Attorney General Brian Benczkowski in October 2018 that are relevant to the determination of whether a monitor is needed. The Guide further notes that a monitor will generally be unnecessary if the company has, by the time of resolution, implemented an effective and appropriately resourced compliance program. Notably, not one monitor was imposed in 2020.
- In addition to providing an overview of the DOJ's policy against piling on, the updated Guide lists the factors prosecutors should evaluate in deciding whether and how much to consider penalties imposed by other authorities, including: (1) the egregiousness of a company's misconduct; (2) statutory mandates regarding penalties, fines and/or forfeitures; (3) the risk of unwarranted delay in achieving a final resolution; and (4) the adequacy and timeliness of a company's disclosures, and its cooperation with the DOJ, separate from any such disclosures and cooperation with other relevant enforcement authorities.
- The updated Guide acknowledges that robust pre-acquisition due diligence may not always be possible, and that in such situations, "the DOJ and SEC will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts." The Guide further notes that under the DOJ's FCPA Corporate Enforcement Policy, an acquiring company that makes a voluntary disclosure may be eligible for a declination, even in the face of aggravating circumstances in relation to the target.
- The updated Guide includes a new qualification that in order for a parent company to be liable for a subsidiary's actions, the government must show that "the subsidiary is acting within scope of authority conferred by the parent."
- The updated Guide advises that a company's compliance program should be tailored to the company's specific risks, and that the program should evolve as the company's business and markets change. The Guide further requires that the compliance program be "adequately resourced and empowered to function effectively" and shown to work "*in practice*."
- The updated Guide makes clear that "a company's internal accounting controls are *not synonymous* with a company's compliance program," while recognizing that effective compliance programs will "contain a number of components that may overlap with a critical component of an issuer's internal accounting controls."
- Finally, the Resource Guide characterizes the significance of how a company responds to misconduct as the "truest measure of an effective compliance program," and confirms the DOJ's and SEC's expectations that a company incorporate into its compliance program the lessons learned from any compliance investigation or violation.

Amendments to rules governing whistleblower reward program

On September 23, 2020, the SEC voted to adopt amendments to the rules governing its whistleblower reward program, which was established as part of the Dodd-Frank Act of 2010. The amendments are designed to increase efficiencies around the review and processing of whistleblower award claims, and to provide the Commission with additional tools to reward meritorious whistleblowers for their contributions to a successful matter. Some of the key amendments are noted below:

- Consistent with the Supreme Court's holding in *Digital Realty Trust, Inc. v. Somers*, the amendments provide whistleblower protections against retaliation only for individuals who make written reports to the SEC.

- Whistleblowers with potential awards of less than $5 million (historically nearly 75% of all whistleblower awards) now qualify for a presumption that they will receive the maximum statutory percentage award of 30%, subject to the absence of whistleblower culpability or other negative award criteria. Other, larger awards will continue to be evaluated consistent with past practice.

- The amendments give the SEC the discretion to apply upward adjustments to awards of $5 million or less.

- The amendments affirm that award amounts are to be determined exclusively based on the application of the award factors set forth in the Commission's whistleblower rules, and that there is no post-award assessment of whether award amounts are too small or too large.

- The SEC may bar applicants who submit materially false, fictitious or fraudulent statements in their whistleblower or other submissions to the SEC, as well as applicants who have made three or more frivolous claims in SEC actions.

- The program will now permit awards based on deferred prosecution agreements and non-prosecution agreements as well as SEC settlements.

Looking Ahead

While enforcement activity remained roughly in line with the 10-year average in 2020, the number of disclosed investigations has steadily declined over the last three years, which suggests that enforcement, at least against large publicly-traded companies, may ebb over the coming years. Indeed, only one of the 38 companies with an ongoing FCPA-related investigation (John Wood Group plc) has to date disclosed an accrual in anticipation of settlement. The underlying reasons for the decrease in investigations is not known, but various FCPA commentators, including the FCPA Clearinghouse, have previously speculated that the decline may be at least partially attributable to the enforcement priorities of the Trump administration, given President Trump's stated antipathy toward the FCPA. The impending change in administration, with the concomitant changes to personnel and priorities, may shed additional light on this decline.

Appendix 1:
FCPA-Related Violations Initiated or Announced in 2020 [By Defendant]

Below is a list of the cases initiated or announced in 2020. Links in blue were initiated in prior years but announced in 2020. Links in red were initiated in 2020.

U.S. v. Junki Kusunoki, et al.
- Junji Kusunoki
- Reza Moenaf
- Eko Sulianto

U.S. v. Luiz Eduardo Andrade
U.S. v. Roberto Finocchi
U.S. v. David Diaz
U.S. v. Jose Tomas Meneses
U.S. v. Rodrigo Garcia Berkowitz
U.S. v. Hector Nunez Troyano
U.S. v. Lennys Rangel
U.S. v. Edoardo Orsoni
U.S. v. Daniel Sargeant
U.S. v. Airbus SE
U.S. v. Daniel Comoretto
U.S. v. Tulio Anibal Farias-Perez
U.S. v. Jose Vicente Gomez Aviles
U.S. v. Felipe Moncaleano Botero
U.S. v. Juan Ribas Domenech
In the Matter of Cardinal Health, Inc.
U.S. v. Roberto Heinert
U.S. v. Leonardo Santilli
U.S. v. Carlos Enrique Urbano Fermin
S.E.C. v. Asante K. Berko
In the Matter of Eni S.p.A.
In the Matter of Novartis AG
U.S. v. Alcon Pte Ltd
U.S. v. Novartis Hellas S.A.C.I.
U.S. v. Luis Enrique Martinelli Linares, et al.
- Luis Enrique Martinelli Linares
- Ricardo Alberto Martinelli Linares

In the Matter of Alexion Pharmaceuticals, Inc.
U.S. v. Javier Aguilar
U.S. v. Jose Luis de Jongh-Atensio
In the Matter of World Acceptance Corporation
U.S. v. Margaret Cole, et al.
- Margaret Cole
- Debra Parris
- Dorah Mirembe

In the Matter of Herbalife Nutrition Ltd.
U.S. v. Herbalife Nutrition Ltd.
U.S. v. Sargeant Marine Inc.
In the Matter of J&F Investimentos, S.A., et al.
- J&F Investimentos S.A.
- JBS S.A.

- Joesley Batista
- Wesley Batista

U.S. v. J&F Investimentos SA
U.S. v. The Goldman Sachs Group, Inc.
U.S. v. Goldman Sachs (Malaysia) Sdn. Bhd.
U.S. v. Beam Suntory Inc.
In the Matter of The Goldman Sachs Group, Inc.
U.S. v. Natalino D'Amato
U.S. v. Vitol Inc.
U.S. v. Bruno Luz
U.S. v. Jorge Luz
U.S. v. Raul Gorrin Belisario, et al.

- Claudia Patricia Diaz Guillen
- Adrian Jose Velasquez Figueroa

U.S. v. Deck Won Kang
U.S. v. Deutsche Bank Aktiengesellshaft