

2020 Q3 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 third 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 third quarter of 2020, the SEC and DOJ filed eight FCPA-related [Enforcement Actions](#), and seven previously filed actions were announced or unsealed. DOJ proceedings comprised the bulk of third quarter enforcement activity, claiming 12 of the 15 actions filed, announced, or unsealed between July and September. Of the 15 total actions, four were against corporate defendants. Figure 1 shows all the enforcement actions filed, announced, or unsealed between July and September of 2020.

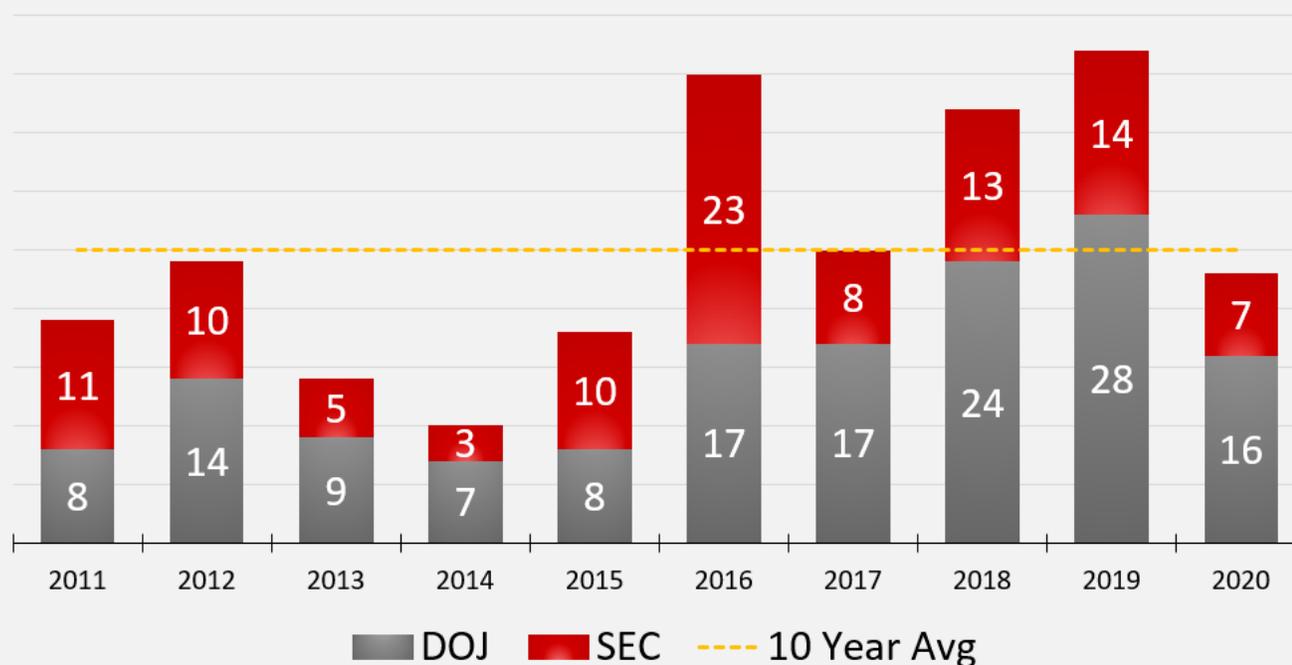
**Fig. 1, FCPA-Related Enforcement Actions
Initiated or Announced in Q3, 2020**

Case	Date Initiated	Date Announced/Unsealed	Sanctions
U.S. v. Luiz Eduardo Andrade	Sep. 22, 2017	Sep. 22, 2020	Ongoing
U.S. v. David Diaz	Mar. 28, 2018	Sep. 22, 2020	Ongoing
U.S. v. Jose Tomas Meneses	Jun. 8, 2018	Sep. 22, 2020	Ongoing
U.S. v. Hector Nunez Troyano	Feb. 20, 2019	Sep. 22, 2020	Ongoing
U.S. v. Daniel Sargeant	Dec. 18, 2019	Sep. 22, 2020	Ongoing
U.S. v. Daniel Comoretto	Feb. 6, 2020	Sep. 10, 2020	Ongoing
U.S. v. Luis Enrique Martinelli Linares, et al. Luis Enrique Martinelli Linares Ricardo Alberto Martinelli Linares	Jun. 27, 2020	Jul. 6, 2020	Ongoing
In the Matter of Alexion Pharmaceuticals, Inc.	Jul. 2, 2020	Jul. 2, 2020	\$21,476,531
U.S. v. Javier Aguilar	Jul. 10, 2020	Sep. 22, 2020	Ongoing

U.S. v. Jose Luis de Jongh-Atensio	Jul. 16, 2020	Aug. 6, 2020	Ongoing
In the Matter of World Acceptance Corp.	Aug. 6, 2020	Aug. 6, 2020	\$21,726,000
U.S. v. Margaret Cole, et al. Margaret Cole Debra Parris Dorah Mirembe	Aug. 13, 2020	Aug. 17, 2020	Ongoing
In the Matter of Herbalife Nutrition Ltd.	Aug. 28, 2020	Aug. 28, 2020	\$67,313,498
U.S. v. Herbalife Nutrition Ltd.	Aug. 28, 2020	Aug. 28, 2020	\$55,743,093
U.S. v. Sargeant Marine Inc.	Sep. 22, 2020	Sep. 22, 2020	\$16,600,400

After the slower than average pace of FCPA-related enforcement activity through the first half of 2020, the DOJ and SEC significantly picked up the pace in the third quarter. The eight enforcement actions filed between July and September brought enforcement activity in 2020 to roughly the ten-year average, though the ten-year average is still below the pace seen in the past few years. Figure 2 compares the level of enforcement activity between January and September in each of the last ten years.

Fig. 2, Enforcement Actions per Year through Q3

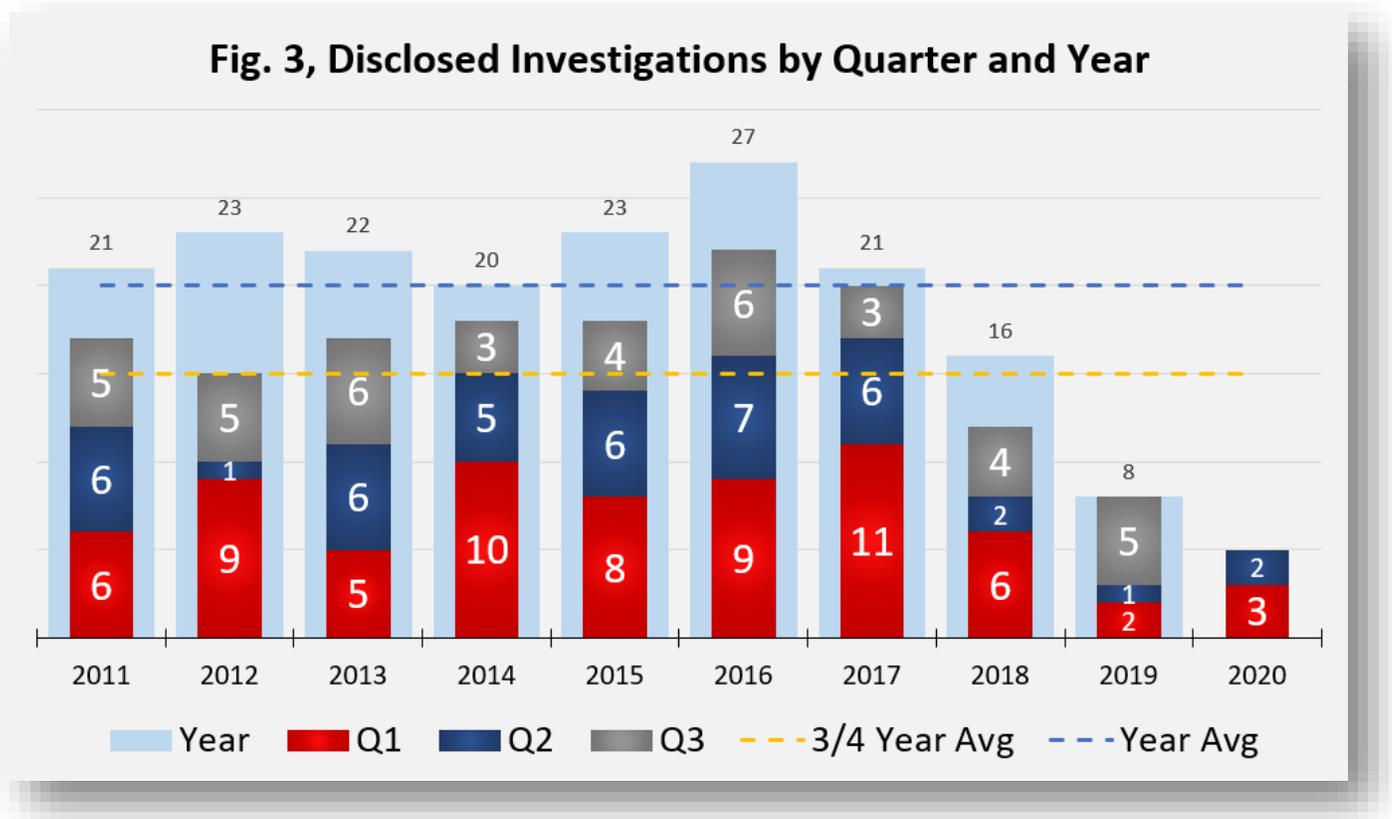


Investigations

U.S. authorities are currently investigating at least 37 different entity groups for possible FCPA violations. Last quarter, no company disclosed a new FCPA-related [Investigation](#) by the DOJ or SEC. However, at least two companies ([500.com Limited](#) and [Pactiv Evergreen Inc.](#)) disclosed FCPA-related internal investigations during the third quarter. In both cases, the disclosures did not indicate that either the DOJ or SEC had initiated investigations into the companies.

The lack of new disclosed investigations by the DOJ or SEC continues the trend the Clearinghouse has noted in several previous [quarterly reports](#): while enforcement activity remains relatively robust, the decreasing numbers of disclosed investigations suggests a significant drop in the numbers of enforcement actions in the coming years. While it is possible that fewer companies are reporting FCPA-related investigations in their SEC filings or that regulators have shifted their enforcement priorities to focus on non-reporting companies, both of those explanations seem dubious.

Figure 3 compares the number of investigations initiated by U.S. regulators in the first three quarters and full year for each of the last ten years.



According to information disclosed in SEC filings and charging and settlement documents, the SEC resolved four publicly-disclosed investigations in the third quarter and the DOJ resolved three. The SEC filed an enforcement action against [Alexion Pharmaceuticals, Inc.](#) on July 2 (the DOJ had closed its investigation against the company with no further action in the second quarter). The SEC filed an enforcement action against [World Acceptance Corp.](#) on August 6, while the DOJ issued a formal declination to the company on August 5. Both the DOJ and SEC closed their investigations into [KBR, Inc.](#)'s connection with Monaco-based Unaoil on August 6. Finally, both the DOJ and SEC filed enforcement actions against [Herbalife Nutrition Ltd.](#) on August 28.

Update on SEC Disgorgements

In the [last quarterly report](#), the Clearinghouse discussed the 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) about 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 *Liu*, the Court confirmed the SEC's ability to seek disgorgement subject to certain constraints: (1) equitable relief must be "for the benefit of investors"; (2) disgorgement may not be sought against multiple individuals under a theory of joint and several liability; and (3) 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.

Left unanswered by *Liu* is the extent to which the decision could impact FCPA enforcement, given that disgorgement plus prejudgment interest has become the dominant remedy sought by the SEC in FCPA enforcement actions. Indeed, in the three SEC enforcement actions filed in the third quarter, disgorgement and interest remained the dominant form of remedy. In the case against [Herbalife](#), it was the only monetary sanction levied, while in the cases against [Alexion Pharmaceuticals](#) and [World Acceptance](#), disgorgement and interest represented 84% and 91% of the total sanctions imposed on the companies, respectively. In all three cases, the SEC ordered the companies to pay the disgorgement and interest to the U.S. Treasury. Clearly *Liu* has yet to materially change how the SEC is resolving FCPA actions or the amount that Treasury is recovering from those actions.

Looking Ahead

Of the four companies that had reported accruals in anticipation of settlements at the time of the second quarter report, only [John Wood Group plc](#), which disclosed an accrual in March 2020 for \$46 million, has yet to resolve its FCPA-related investigation by the DOJ and SEC. An accrual in the FCPA investigation context typically indicates that settlement negotiations have proceeded sufficiently for a company to accurately predict the sanctions it will pay, but it does not necessarily indicate that the settlement itself is imminent. For example, [Walmart Inc.](#) first disclosed that it had made an accrual in anticipation of a settlement in November 2017, but the DOJ and SEC did not file the enforcement actions against the company until June 2019. Though the Walmart case appears to be an outlier, it remains impossible to say when precisely John Wood Group will ultimately settle.

Notably, the 2020 election is just one month away. Since neither the Biden nor Trump campaigns appear to have a specific policy with respect to the FCPA, it remains an open question whether a change in administration would lead to an increase in the number of new FCPA-related investigations reported by companies, especially given how significantly those numbers have fallen in recent years. Stay tuned.

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