

WHERE FROM HERE?

*a conversation series about the
great acceleration of 2020 and
what it means for the future*



TRADE AND ANTI-CORRUPTION MATTERS IN A BIDEN ADMINISTRATION: WHAT TO EXPECT



Panelists



Harry Clark
Partner, Orrick
hclark@orrick.com



Anne Murray
Partner, Orrick
amurray@orrick.com



Maria Sergeyeva
Managing Associate, Orrick
msergeyeva@orrick.com



Meg Hennessey
Senior Associate, Orrick
mhennessey@orrick.com



David Rhinesmith
Senior Associate, Orrick
drhinesmith@orrick.com

TRADE MATTERS



The Complexities of the Current Trade Environment

- Trump Administration intensified Obama policy of increasingly active restraints on international trade and investment – import duties and quotas, export restrictions, economic sanctions, CFIUS investment restraints, etc.
- For at least short-to-medium term, likely more continuity than change from Biden Administration:
 - rare political consensus – for activist trade policy
 - many trade and investment measures result from executive determinations and actions under statutory authorizations and directions – often, extensive process would be needed to lift measures even if Biden Administration had desire and political support to do so
- Katherine Tai, nominated for U.S. Trade Representative, plans to “harness” U.S. trade relationships to help the administration revitalize the economy.
- A detailed trade plan is expected to be announced today (January 21).





What We've Heard During the Campaign

- Some indications of the trade-related developments from the Biden's campaign were as follows:
 - On China/Tariffs: *"I'm not going to make any immediate moves, and the same applies to the tariffs. I'm not going to prejudice my options."*
 - On Iran: *"If Iran moves back into compliance with its nuclear obligations, I would re-enter the JCPOA as a starting point to work alongside our allies in Europe and other world powers to extend the deal's nuclear constraints."*
 - On Russia/Ukraine: *"For diplomacy to work, however, we need stronger leverage over Moscow, and that means working more closely with our European partners and allies to ensure that Russia pays a heavier price for its ongoing war in Ukraine."*
 - On North Korea: *"As president, I will empower our negotiators and jumpstart a sustained, coordinated campaign with our allies and others – including China – to advance our shared objective of a denuclearized North Korea."*
 - On domestic priorities: *"I'm not going to enter any new trade agreement with anybody until we have made major investments here at home and in our workers."*

Decisive Factor Across Trade and Investment Policy

- Can Biden Administration find a way to work constructively with China on trade and investment policy – reach “win-win” arrangements?
- Challenges – political consensus that:
 - China engages in unfair trade practices that undermine U.S. competitiveness
 - China’s trade and investment practices threaten U.S. security
- Ways forward?
 - Unfair trade practices – build on January 2020 U.S.-China agreement?
 - Security concerns – rely on technological innovations to preserve U.S. security?
- Progress unlikely for a year or more.





Expected Early Action

- **Rebuilding relationships and close cooperation with US allies:** an expected key component of President Biden's strategy, including on the economic consequences of the pandemic and exerting economic pressure on China.
 - President Biden named getting the United States back on the same page with its allies a "major priority." (*"And as we compete with China to hold China's government accountable for its trade abuses, technology, human rights, and other fronts, our position would be much stronger when we build coalitions of like-minded partners and allies that make common cause with us in the defense of our shared interests and our shared values."*)
- **Reshoring supply chains:** President Biden pledged an immediate 100-day review to identify the national security risks to the supply chains following massive vulnerabilities revealed by the pandemic (PPE, pharmaceuticals, food).
 - “Buy American” / onshoring agenda has strong support in Congress
 - Use of the Defense Production Act authority beyond emergency preparedness to support manufacturing of products critical to national security

ADDRESSING UNFAIR TRADE PRACTICES

Tariffs / Anti-dumping and Countervailing Measures

- The Trump Administration heritage includes:
 - **Tariffs on Chinese imports:** Section 301 of the Trade Act of 1974 allows retaliatory measures if a country takes measures that are unjustified, unreasonable, or discriminatory.
 - Four rounds of increased tariffs imposed on approximately 2/3 of US imports from China in 2018-2020, with some exclusions
 - More than \$360bn of Chinese goods and more than \$110bn of US products affected by the increase in tariffs
 - **Steel and aluminum tariffs:** Section 232 of the Trade Expansion Act of 1962 allows restricting imports if they endanger national security.
 - In 2018, a 25% tariff on steel and a 10% tariff on aluminum imports and certain derivatives were introduced, with some exemptions
 - **Rapid increase in anti-dumping and countervailing measures:**
 - Out of 222 trade policy investigations, 65 were in relation to China.
- US business community strongly opposed the additional trade barriers, citing:
 - Increased costs for US consumers and producers
 - Decreased domestic demand for imports and for exports subject to retaliatory tariffs



ADDRESSING UNFAIR TRADE PRACTICES:

"Phase One" Deal

- Under the "Phase One" deal signed by the United States and China in January 2020:
 - China pledged to boost US imports by \$200bn above 2017 levels and strengthen intellectual property rules
 - The United States agreed to halve some of the new tariffs it had imposed on China
- "Phase Two," expected to address additional trade issues, has stalled.
- President Biden stated he would not touch the tariffs or change the agreement with China until undertaking a full review of the US-China policy.
 - Any elimination of tariffs on China would likely only happen in exchange for the new negotiated commitments from Beijing (to advance, e.g., climate change priorities).
 - The view that China's economic rise has been fueled by unfair trade practices has a strong bipartisan support.
 - President Biden stated that the goal would be *"to pursue trade policies that actually produce progress on China's abusive practices — that's stealing intellectual property, dumping products, illegal subsidies to corporations."*
- The first tariffs to go will likely be the ones imposed on the U.S. allies (Section 232 tariffs on steel and aluminum).
- The new administration may attempt to resolve a long-running dispute with the EU over the Boeing and Airbus subsidies that led to tariffs imposed by both sides.

ADDRESSING UNFAIR TRADE PRACTICES:

WTO and Multilateral Trade Agreements

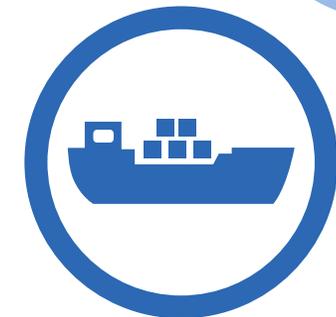
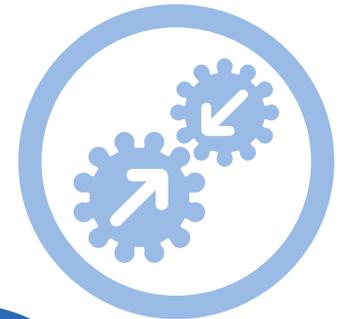
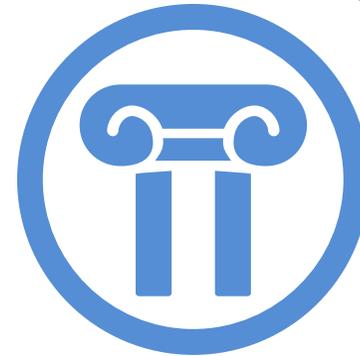
- The Trump administration was highly critical of the WTO and sought its reformation.
- As a result of the Trump Administration's blocking actions, WTO enters 2021 without a leader, a functioning Appellate Body, or a clear direction on reforms.
- President Biden expressed a desire for the United States to participate in WTO and multilateral trade agreements, including the Trans-Pacific Partnership, from which the Trump Administration withdrew in 2017 (potentially the world's largest free trade deal in history, accounting for 1/3 of the world's population and economy, which China has expressed a desire to join).
- Emergency G-20 Summit: some analysts have called on President Biden to invigorate G-20 to set a global agenda for recovery from the pandemic.



ADDRESSING NATIONAL SECURITY-RELATED TRADE ISSUES

Addressing National Security-Related Trade Issues

- The Trump Administration imposed restrictions via:
 - New economic sanctions
 - Export controls
 - Foreign investment regulation
- Such restrictions were largely aimed at curbing technology transfers to Beijing
- Unlike the "Phase One" agreement in the unfair trade practices areas, no bilateral agreement concerning national security matters is realistically possible between the United States and China, or Russia, or Iran.



Foreign Investment Regulation

- Regulatory scrutiny of foreign investment in the United States has been on the rise in the recent years.
- The Biden Administration voiced concerns over Chinese technology theft and called for reshoring of supply chains.
- Bipartisan consensus around more rigorous government reviews of foreign investments into critical technologies and related fields.
- CFIUS's expanded jurisdiction, new regulations, and increased funding determine an increased regulatory scrutiny the transaction with potential national security threats.
- During the campaign, President Biden called for new approaches to supply chain security to avoid the dependency of the United States or its allies on critical supplies from China and Russia.
- China- and Russia-related deals, particularly in the sensitive industries (the health sector, technology, or personal data handling) will continue to be of high interest to CFIUS.

ADDRESSING NATIONAL SECURITY-RELATED TRADE ISSUES: China

- *"When it comes to trade, either we're going to write the rules of the road for the world or China is – and not in a way that advances our values."*
 - Despite some progress on the "Phase One" deal, the Trump administration attacked Chinese companies on national security grounds, including, among others:
 - Tightened export restrictions on telecommunications giant Huawei
 - Attempts to block the popular app TikTok over data security concerns
 - Imposition of sanctions over China's intervention in Hong Kong and its treatment of Muslim minority groups in the Xinjiang region
 - President Biden indicated that concerns such as IP theft, security concerns, usage of technology to advance state control remain with respect to China. He also signaled the plans to keep the United States ahead in artificial intelligence, semiconductors and 5G-network equipment.
 - Given the current relationship with China, no reason to expect a rollback of sanctions measures against Chinese companies. Relationship with China is expected to be more linear, but there will be a lot of continuity.
 - There is a potential to go even beyond Trump's administration, e.g., by implementing new export controls on foundational and emerging technologies that were authorized in 2018 but have been slow to materialize.



ADDRESSING NATIONAL SECURITY-RELATED TRADE ISSUES: Iran

- The 2015 Joint Comprehensive Plan of Action (JCPOA), a nuclear accord to curb Iran's uranium enrichment program, was abandoned by the Trump administration in 2018. In addition, more than a 1,000 Iran-related sanctions were issued in the last four years.
- President Biden described Trump's "maximum pressure" campaign as a "bust" that backfired by prompting Iran to loosen its adherence to the JCPOA.
- He signaled an intention to revive JCPOA "if Iran returns to strict compliance" – *i.e.*, rolls back its recent breaches, at a minimum.
- Talks of "JCPOA-Plus" may mean that further concessions from Iran would be needed to lift the recent restrictions.
- U.S.-Iran diplomacy is defined by decades of mutual wariness – no immediate rollback of sanctions and other measures can be expected.



Russia, Cuba, Venezuela

- **Russia** – continued pressure in response to:
 - Russia's disruptive actions (*"We need to disrupt and deter our adversaries from undertaking significant cyberattacks in the first place. We will do that by, among other things, imposing substantial costs on those responsible for such malicious attacks, including in coordination with our allies and partners"*)
 - Poisoning of the Russian opposition leader (Magnitsky-style sanctions possible, to match the European sanctions)
- **Cuba** – some rollback to stop damage to civil society and small businesses is possible:
 - Some restrictions on remittances and travel to Cuba may be eased
 - Maintain a tough stance against the government should be expected
- **Venezuela** – continued pressure:
 - May attempt brokering negotiations for free and fair elections, offering some sanctions relief in return
 - Pressure on the Maduro regime will likely continue

FOREIGN CORRUPT PRACTICES ACT





Agenda

- Impact of the Pandemic
- FCPA Enforcement Trends
 - Recent Enforcement Recap
 - Record Settlements
 - Industries in the Crosshairs
 - Global Enforcement and Coordination
- Related New Legislation
- Compliance Program Expectations



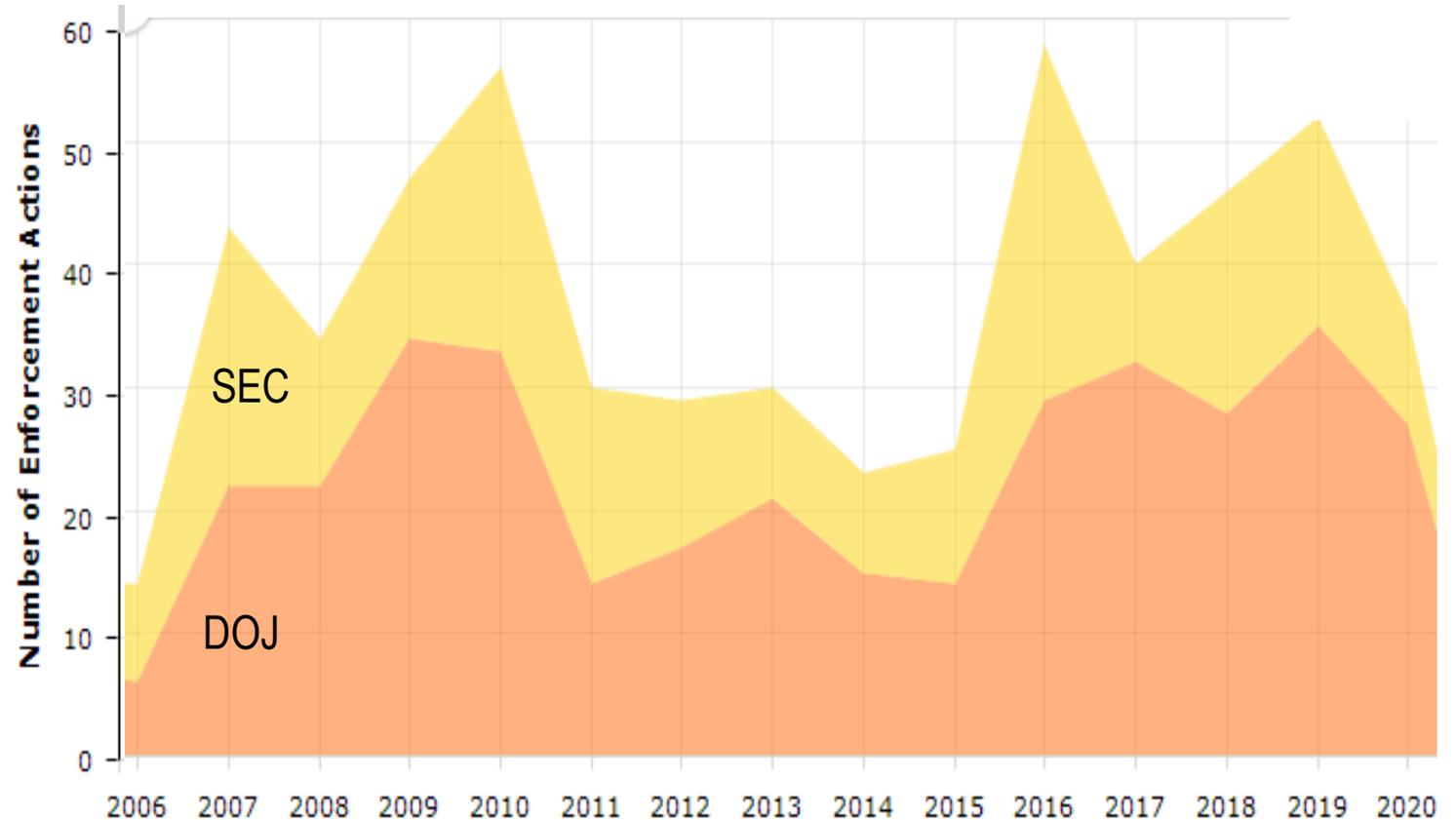
FCPA: Impact of Pandemic

- **Perfect storm for fraud and corruption**
 - Supply chain disruption
 - Increased demand for certain categories of products/devices
 - Leadership focused on immediate crisis
 - Business challenges (*e.g.*, budget cuts, furloughs, and layoffs)
 - Employees and business partners under similar pressure
 - Increased government demands, purchasing, research findings
 - Government relief programs
 - Insurance claims and payments

FCPA: Impact of Pandemic

- Economic downturn + periods of upheaval → followed by an uptick in fraud-related investigations/enforcement
- **2021:** new administration – white collar crime, corruption, and enforcement may be a priority

DOJ & SEC FCPA Enforcement Actions by Year



Source: Stanford Law School

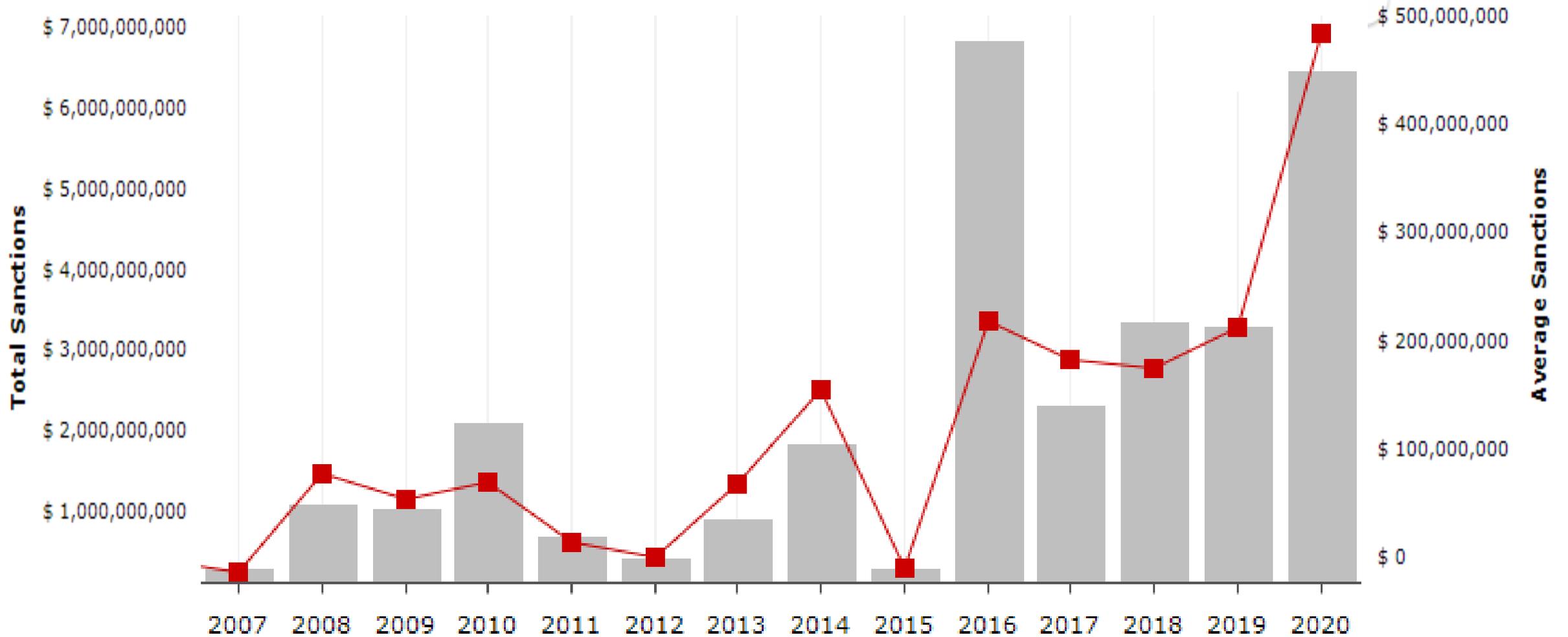


FCPA: Enforcement Trends

- FCPA enforcement tends to be politically agnostic
- 2020 was a “landmark year” for FCPA enforcement
 - Largest one-year total penalties imposed by U.S. officials: ~\$6 billion
 - DOJ's Fraud Section charged 30 individuals in connection with FCPA matters
 - No monitorships imposed; some self-monitoring requirements
 - SEC announced ~70% increase in whistleblower complaints and issued its largest-ever whistleblower award (US \$114 million)
 - As in years prior, overwhelming majority of cases involved third parties (agents, consultants, brokers)

FCPA: Enforcement Trends

Total & Average Sanctions by Year



Source: Stanford Law School



FCPA: Enforcement Trends in 2020

- **Record Settlements**

- 2020 was a record year for total FCPA-related financial penalties, led by some of the largest U.S. settlements ever
 - Began and ended with two major resolutions: Airbus ~\$2.1B settlement in January; Goldman Sachs ~\$3.3B settlement in October
 - Cases continue to involve coordination with non-U.S. authorities (amounts shown here are penalties paid to U.S. authorities)
- 12 settlements of corporate enforcement actions

- **Enforcement actions**

- DOJ: 27
- SEC: 9

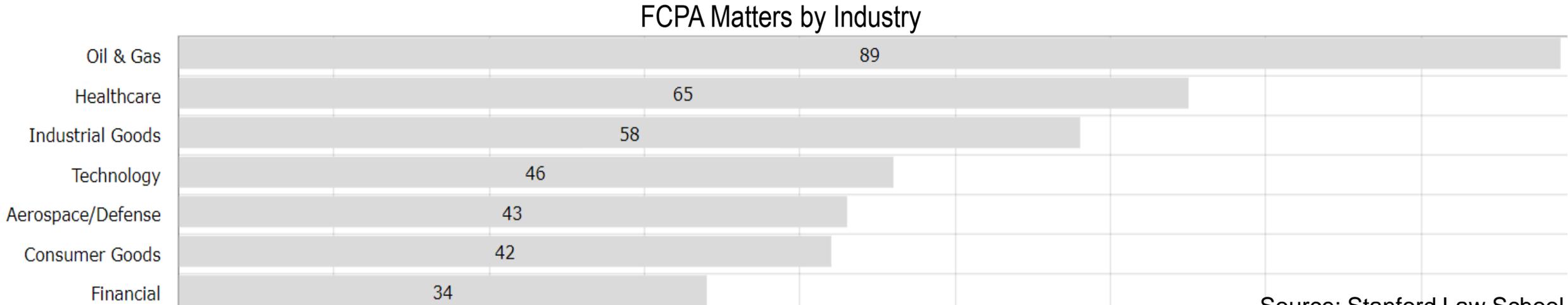


FCPA: Enforcement Trends

- **Global Enforcement and Coordination**
 - Continuing trend of cooperation and information sharing across borders
 - Outside the U.S., countries have strengthened anti-bribery laws and enforcement efforts
 - China amended its anti-bribery law to make penalties more severe where the conduct involves those who might not be considered “state functionaries”
 - South Korea is launching a new anti-corruption investigative agency: the Corruption Investigation Office for High-Ranking Officials
 - Regional focus on conduct in Asia and South America

FCPA: Enforcement Trends

- Industries “in the Crosshairs”?



Source: Stanford Law School

- **2020:** Continued to see settlements across these industries

- **2021?** **The Washington Post**

Silicon Valley braces for tougher regulation in Biden’s new Washington

FCPA: Enforcement Trends



- **Example: Airbus (January 2020)**
 - Total of \$4B to settle global bribery and trade violations
 - Separate settlements in the U.S., UK, and France
 - Eight-year investigation triggered by a British whistleblower
 - Countries involved in relevant conduct include: China, Malaysia, Sri Lanka, Taiwan, Indonesia, and Ghana
 - Focus on payments, gifts, and benefits provided through third parties
 - Remediation credit for steps taken in this area—*e.g.*, terminating relationships
 - Trade violations related to International Traffic in Arms Regulations (ITAR) and the Arms Export Control Act (AECA)

FCPA: Related New Legislation

- ***2020 National Defense Authorization Act*** – provisions that may shape enforcement include:

- **Corporate Transparency Act:**

- Takes aim at shell companies and requires that a registry be created to collect information about beneficial owners of corporate entities
- Information will be made available to law enforcement
- Implications for money laundering, corruption, and bribery enforcement

- **Modification to Limitations Period for SEC Enforcement**



FCPA: Compliance Program Expectations

- DOJ/SEC Hallmarks of an effective compliance program
- Revised in the 2020 version of DOJ/SEC's FCPA Guide





FCPA: Compliance Program Expectations

- **New Hallmark: *Investigation, Analysis, and Remediation of Misconduct***
 - Maintain an appropriately funded mechanism for the timely and thorough investigation of any allegations or suspicions of misconduct by the company, its employees, or agents
 - Document the investigative process, findings, and disciplinary and remediation measures
 - Perform root-cause analyses on incidents of misconduct, and integrate lessons learned into compliance policies, trainings, and internal controls in order to continuously improve the compliance program (ensuring it is tailored to address relevant risk areas for the company and industry)



FCPA: Compliance Program Expectations

- In 2020, DOJ officials underscored other two priorities: (1) **access to/use of data** in compliance programs; and (2) **periodically updating** compliance programs
 - *“We recognize that companies have access to a fair amount of data. We want to make sure they’re thinking about how they use data for compliance purposes, so they can detect compliance problems at an early stage and address it.”*
 - *“We want to convey the message that we want to see compliance programs updated periodically. Evaluated, refreshed, and updated. It is one thing to have a good program on paper, it’s another thing to resource it and empower it and ensure that it’s getting adequate attention.”*
- Authorities are also increasingly focused on the strength of companies' **internal accounting controls** (Compliance and Finance & Accounting collaboration)



FCPA: Compliance Program Expectations

- **Sources for Guidance on Building Effective Anti-Corruption Compliance Programs**
 - **Second Edition of the DOJ and SEC’s FCPA Resource Guide** (updated July 2020; first addition was published in 2012): <https://www.justice.gov/criminal-fraud/file/1292051/download>
 - **Evaluation of Corporate Compliance Programs** (updated June 2020): <https://www.justice.gov/criminal-fraud/page/file/937501/download>
 - **FCPA Enforcement Policy** (updated November 2019): <https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977>
 - **The U.S. Sentencing Guidelines** (see pages 514 – 522): <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf>
 - **OECD Anti-Corruption Ethics and Compliance Handbook**: <https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf>
 - **Transparency International's Corruption Perception Index** (2020 data coming late January): <https://www.transparency.org/en/cpi/>

WHERE FROM HERE?

*a conversation series about the
great acceleration of 2020 and
what it means for the future*

