

Speaker 1: [inaudible]

Speaker 2: Welcome to the GT ABC podcast. I'm your host, Cuneyt Akay here. The GT stands for Greenberg Traurig in the ABC stands [00:00:30] for anti-bribery and corruption. On this episode, we're going to do a year in review and talk about what FCPA enforcement looked like in 2020. And I'll start off by ruining the suspense. It was a record setting year for all the top. That's been out there about decreased enforcement over the last few years. It just hasn't happened. So let's dive right into the stats. And then at the end of this episode, we'll discuss some trends that we're seeing overall in FCPA enforcement. Let's first start with corporate [00:01:00] enforcement and anyone that's been following the FCPA knows right away. The 2020 was the biggest year ever for enforcement. In terms of counties, there were a total of 12 settlements with a record setting, 2.7, \$8 billion in fines.

Speaker 2: Yes, B for billion in fines. Now the number of cases wasn't really abnormal we've, uh, in the last few years, seen around 10 to 15 cases per year, but the record setting component certainly [00:01:30] was in the overall fine amounts for FCPA enforcement in 2020. And we saw a couple of other records fall as well. We had the largest single FCPA penalty ever for a corporate enforcement action with one action totaling, 1.6, \$3 billion in total fines. We also saw in early 2020, the largest global anti-corruption resolution related to the FCPA, which came in at almost \$4 billion for one, [00:02:00] uh, enforcement action. Overall, the total global penalties related to the FCPA were nearly \$8 billion. So any way you slice it in terms of penalties, corporate enforcement was a record setting year in 2020. Now we saw the usual wide range of penalties like we've seen in previous years.

Speaker 2: So as I mentioned earlier, we had a record setting penalty at 1.6, \$3 billion, but we also saw some smaller enforcement actions and the smallest one this year came [00:02:30] in right around \$9 million for a corporate enforcement action. So what other statistics did we see in 2020 other than these huge penalties that came about? Well, a couple other interesting facts arose with corporate enforcement in 2020. The first is there is zero corporate monitorships among the 12 case settlements. And over the last five to seven years, we've seen about half of the cases that get settled, involve some type of monitorship, but we've certainly seen a decrease [00:03:00] over the last two or three years. And for the first time in a while, we have a year where there were zero monitorships. And I think it's a little too early to tell whether that's a trend or a blip on the radar screen, but it's certainly something that we will all continue to do monitor in the future.

Speaker 2: No pun intended. Another interesting development this year was that we had two of the 12 cases where the company was a repeat offender. And that's certainly interesting. And as we'll talk about in the trends a little later on is that we're certainly seeing more and more [00:03:30] repeat offender cases. And we actually had one that doesn't quite fit into the repeat offender circumstance, where there was a forcement action by the DOJ later in 2020 that involved the exact same conduct that the company had already settled with the sec with back in 2018. And it certainly isn't a repeat offender type of case because the company was charged for the exact same conduct as I just mentioned.

But that case [00:04:00] certainly raises some interesting issues, particularly around fairness, uh, in penalties, in the FCPA, in terms of how cases originated this year, we had a pretty even split about a third of the cases involved, a foreign investigation where, uh, the case was originated either out of a foreign jurisdiction or some foreign reporting.

Speaker 2: And that's how the case came to light. About a third of the cases were because of proactive us government investigations. And [00:04:30] then the last third were through voluntary disclosures made by the companies. And that's a pretty even split and a pretty interesting split in terms of how the cases originated this year. Now let's talk about where these companies are located because there's been this growing narrative in the last several years that the FCPA and FCPA penalties have been heavily skewed towards foreign based companies. Uh, quite often I see people commentating about [00:05:00] how the FCP is unfair because foreign companies or foreign based companies seem to get targeted with larger enforcement penalties. Well, that wasn't true in 2020, uh, it was almost an even split, uh, in the number of cases. In fact, seven of the 12 cases were a US-based companies, but the penalties for those seven companies were almost \$2 billion.

Speaker 2: And five of the 12 companies that settled with the DOJ or sec were foreign [00:05:30] based companies. And those pounders were less than a billion. Now, obviously that one year doesn't mean there's a trend, but it may certainly seem to indicate that the narrative that I've been hearing is not entirely accurate. How about the industries that seem to be affected? Well, 2020 was really no different than the last half a dozen or so years. We saw very similar industries that got hit with FCPA penalties, oil and gas, financial services, [00:06:00] healthcare, and pharmaceutical, aerospace, and defense and construction engineering. And those have been industries that have been subject to FCPA enforcement in the past one interesting thing is we're starting to see some newer industries such as consumer goods and aggregate agribusiness, where we're seeing some FCPA enforcement as well. Let's talk a little bit about where the alleged bribery conduct occurred in 2020.

Speaker 2: It was quite similar to the last three or four [00:06:30] years. It was similar hotspots. Uh, the bad conduct was alleged to have occurred in the BRIC nations for the most part. So Brazil, Russia, India, and China, but we're also seeing more of a focus on Latin America. And there's a lot more cases that seem to be arising out of Latin America. And that's not particularly surprising because the U S government has certainly made corruption, particularly in Latin America. A priority. One example of that is that the FBI has started a new [00:07:00] international corruption squad that was based, or it has been based out of Miami since 2019. And that certainly indicates that there's going to be a growing focus from the U S government in terms of corrupt corruption cases arising out of conduct in Latin America. Well, we've talked about corporate enforcement, let's turn our attention briefly to what individual enforcement looked like.

Speaker 2: And it wasn't quite the same record setting year for an individual enforcement as we saw in the corporate enforcement [00:07:30] side. But nonetheless, we saw the second highest year ever in terms of individuals charged or indicted for the FCPA or FCPA related crimes. In fact, there's 36 of those individuals. One thing that was interesting is

that we saw this year less straight FCPA charges, but more FCPA related charges. And these typically arise in two different contexts. One is we see the U S government, particularly the DOJ charge [00:08:00] foreign official bribed recipients under FCPA related crimes, such as money laundering and wire fraud. And the reason for that is listeners of this podcast have heard in the past is because a lot of times the U S jurisdiction doesn't extend to those foreign officials under the FCPA, but it does under money laundering and wire fraud statutes.

Speaker 2: And second, we're seeing that the DOJ is using financial crimes like money laundering and wire fraud to charge individuals because those [00:08:30] are often easier to prove than proving a bride was paid. Another thing that was interesting in 2020 about individual enforcement is that we saw less trials this year and given what we saw with the trials and the anticipated trials that we were going to see from 2019 into 2020, we thought at the beginning of the year, that 2020 was going to see some interesting individual trials would really inform FCPA practitioners about how courts and judges viewed [00:09:00] FCPA in particularly issues of jurisdiction. Unfortunately, because of COVID-19, we certainly didn't see the same number of trials as we originally expected. And I guess that's not all that surprising and hopefully we'll get a little more clarity, uh, as courts started to open up in 2021 now, in terms of individual enforcement being related or tied to corporate enforcement.

Speaker 2: One interesting thing is that we saw five of the 12 corporate [00:09:30] entities actions also included related individual charges, but we also saw in 2020, over two dozen individuals charged, laid to conduct in Latin America, that wasn't directly related to any corporate enforcement action. And of course, that always begs the question, whether those individual cases will become a precursor to future FCPA corporate enforcement actions that we'll see in coming years. And I guess we'll just have to wait and see if those [00:10:00] individual cases arising out of Latin America will lead to more corporate Selman or more corporate enforcement actions in the coming years, 2020 was not just a busy year in terms of corporate and individual enforcement, but we also saw some interesting developments outside of the enforcement context. And really three things stood out in 2020 first in June, we saw the DOJ update the evaluation of corporate compliance programs, guidance.

Speaker 2: And we've talked about that [00:10:30] guidance in more detail in previous podcasts, but it was quite interesting in terms of, um, what the changes were. And I think first and foremost, one of the things the DOJ may have been signaling, um, with releasing new guidance and releasing as we'll talk about in a few seconds and update to the resource guide is that I think the DOJ was signaling that, you know, they are still focused and paying attention to the FCPA. Now, in terms of the substance, the evaluation of corporate [00:11:00] compliance program guidance really had kind of five minutes main issues that it addresses are what I would call five T my five takeaways from those revisions. One is the new guidance certainly highlights the compliance programs have to start with a risk assessment. And one of the things that's so important that gets continually brought up in the guidance, is it, the guidance talks about how risk assessments can be just a snapshot in time, but really must be based on a [00:11:30] continuous review of the risk that companies face.

Speaker 2: Second, eh, the, the second one, the thing that the, uh, resource guide discusses and highlights is that compliance programs need to be adequately resourced and individuals need to be empowered, meaning really independent, uh, as a compliance organization. And this is new language in the new version of the evaluations of corporate compliance program guidance. It certainly seems to indicate that the DOJ [00:12:00] believes the compliance programs need to really have independent, but also the resources to adequately address the risks that hopefully they identified in previous risk assessments and ongoing risk assessments. The third takeaway is that as we all know in the corporate environment and every environment today, there's just more data available now, you know, more than ever. And the guidance puts more emphasis on data analytics and more importantly, really data utilization. [00:12:30] And what I think the DOJ is signaling here is that compliance professionals, compliance teams can't turn a blind eye to that type of data.

Speaker 2: And they must utilize that data as they're building and refining their compliance programs. The fourth takeaway involves third parties, and there's a little subtle shift here in the language that the DOJ has been using or used in this new guidance versus what it used to use. If you read previous guidance, it always talked about third party due diligence, [00:13:00] and the language has now shifted more to, to third-party management. And I think what the DOJ is signaling here is that due diligence on third parties isn't enough, but that companies also have to assess and evaluate the business rationale for these third parties, and must also continually monitor and take a look and rescreen these third parties. So that due diligence alone is really not enough. You're just onboarding a third party. And the final takeaway [00:13:30] from the guidance is about lessons learned and the guidance states that companies should periodically update and adapt their compliance programs to lessons learned not only from their own misconduct, but from that of companies that face similar risks.

Speaker 2: Now, another interesting highlight in 2020 was one month after the evaluation of corporate compliance program, guidance came out the DOJ and sec published the second edition of the FCPA resource guide. And this was the [00:14:00] first substantive revision since the initial edition of the resource guide came out in 2012. And for those of us that remember, you know, we'd all heard in the year or so leading up to the initial release of the resource guide that the DOJ and sec were going to put out some type of guidance regarding the FCPA and yeah, as much anticipated, uh, when it got released in November of 2012. Well, there wasn't a lot of publicity or hubbub about the second edition being released. So somewhat of a surprise, [00:14:30] right on the Eve of the July 4th holiday, when the DOJ and sec published their second edition to the FCPA resource guide.

Speaker 2: And there's three things that this update really focused on first, it certainly incorporated new DOJ guidance and policy into the second edition. So for example, the second edition of the FCPA resource guide now includes a discussion in incorporates the DOJ's corporate enforcement policy, which is the policy [00:15:00] that provides a roadmap for companies to receive a declaration of prosecution when they voluntarily self-disclose fully cooperate with any investigation and take timely and appropriate remedial measures. So the new resource guide additions, you know, incorporate some of the, the

new policy that came out new guidance that has come out since 2012. Another interesting aspect about the FCPA resource guide is there's more robust guidance on M and a transactions, particularly, particularly [00:15:30] in the area of successor liability, which is certainly helpful for companies as they start to engage and think about mergers and acquisitions. And third, the FCPA resource guide in the second edition addresses talks more robustly about FCPA penalties, including updated guidance and case law revolving involving, excuse me, forfeitures in discouragement, which as we all know, particularly, uh, in the last few years, disgorgement is typically the largest type of penalty that is levied against [00:16:00] companies by the sec.

Speaker 2: And the final policy or guidance piece that came out happened one month later in August when the DOJ released, uh, an FCPA, uh, DOJ FCPA opinion, and the opinion itself was fairly unremarkable as it confirmed. What many of us are doing, you know, which is that the FCPA does not prohibit legitimate and transparent payments to a foreign government instrumentality. However, what was remarkable was it, this was the first DOJ [00:16:30] FCPA opinion in nearly six years. So what was once a regular occurrence when the DOJ would release several of these opinions every year, uh, which actually provided quite helpful insights to companies and FCPA practitioners had just kind of gone dormant, uh, without much explanation for those nearly six years. So it will be interesting to see if the DOJ will continue to be produce more of these opinions now that they released one in August.

Speaker 2: We certainly haven't [00:17:00] seen one since August, but, uh, we'll, I'll be watching to see if the DOJ issues more of these FCPA opinions in the future. So what does all this mean? So what were the big trends from 2020? And I think the first one is going to be pretty obvious to anyone that's either listened to the beginning of this podcast or has been following the FCPA in the last couple of years. And the first big trend is bigger penalties, 2019 set the record [00:17:30] with \$2.65 billion in penalties in the first single case that went over a billion dollars in settlement amounts. And of course much like what 2020 did, uh, for the rest of the world. It appended, uh, the record for that was set in 2019 in 2020, eclipsed that with 2.7, \$8 billion in penalties and the first case that was over a billion and a half.

Speaker 2: And one of the things that is certainly interesting about [00:18:00] the penalties in the FCPA space is that it isn't just 2020. It isn't just the last two years, either as we've seen almost 90% of the 50 largest FCPA settlements have occurred in the last decade and nearly 50% of the 50 largest FCPA settlements have occurred in just the last four years alone. The other trend that we're seeing, and then we saw a lot of in 2020 is more multi-jurisdictional cases, a third of the cases in 2020 involved foreign [00:18:30] governments. And what's really remarkable about that is foreign governments collected over \$4.5 billion in pound. These relate to FCPA cases in 2020 alone. Now we've seen this trend over the last few years, develop that foreign governments are collecting more FCPA related pounders. And there's a couple of reasons for this. Certainly one is that we're seeing foreign governments adopting anti-corruption laws, similar to the FCPA or starting [00:19:00] to enforce their own anti-corruption penalties.

Speaker 2: And second we're certainly seeing that foreign governments are understanding the benefits of cooperation with the us government when they start to collect some of these very large penalties, but maybe the most remarkable part about this is I just got done talking about how we've seen record setting years in terms of FCPA enforcement penalties. And that 2020 was a record setting year, yet foreign governments collected one and a half times more [00:19:30] in FCPA related settlements in 2020 than the DOJ and FTC combined. So I certainly think we'll see more multi-jurisdictional cases, which of course leads to larger penalties, which is the first trend we just talked about. The third trend that we saw in 2020 is we're certainly starting to see some other us agencies getting into the mix. And what I mean by that is it's not just the DOJ in sec that are enforcing the FCPA.

Speaker 2: Now, certainly [00:20:00] the DOJ and sec are the two government agencies that have jurisdiction to enforce the FCPA, but we're seeing other agencies getting into the mix. As I said, in fact, we saw over half a billion dollars get paid to other us agencies related to FCPA cases in 2020 alone. In fact, for the first time ever, we saw the CFTC find a company late in 2020 for FCPA related violations. The last trend [00:20:30] we'll talk about in terms of corporate enforcement involves repeat offenders. And as I mentioned earlier in 2020, we saw two repeat offender cases. And what we've really seen over the last several years is that over half of the repeat offender cases have taken place in just the last three or four years alone. And the sample size is still pretty small. So it may be a little bit of an overstatement to call this a trend, but it certainly is interesting to note that there have been this many repeat offender cases [00:21:00] in the last four to five years.

Speaker 2: And we'll certainly keep our eyes and ears open to see if we're going to have more repeat offenders in the future. It's somewhat surprising to me because you would think that those companies, um, that have already faced penalties from the DOJ and or sec, um, would be even more diligent than the rest of the corporate world, but we are seeing more repeat offenders in terms of trends from the individual enforcement Fe, uh, space. There [00:21:30] certainly has been a continued emphasis on holding accountable, holding individuals accountable. And we're seeing that, and not only the individual enforcement actions from 2020, but really the last several years, in fact, cumulatively the last three years have seen the largest number of FCPA individual enforcement cases. And as I mentioned earlier, in this episode, as we have the DOJ charging individuals with more FCPA related offenses, such [00:22:00] as money laundering and wire fraud, I'd certainly expect that we'll continue to see an upward tick in individual enforcement.

Speaker 2: Finally, the last trend is we're starting to see more DOJ and sec guidance and policy updates, which is certainly a welcome sign, uh, for practitioners and companies alike. But it also signals that the U S government has a continued focus on the FCPA. And it seems to be signaling particularly with some of the guidance that we saw in 2020 is that the [00:22:30] us government really believes in the importance of ongoing and risk-based compliance. And one of the nice things in this space is the DOJ in particular, but the sec as well, keep on giving tools to practitioners and compliance professionals in terms of what good effective compliance looks like. Well, that's a wrap for what FCPA

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statistics and trends look like in 2020. And I'm sure there's a few companies and certainly some individuals that are happy [00:23:00] to put 2020 behind them from an FCPA perspective. And I guess like much of the rest of the world, that's looking to put 2020 in the rear view mirror. They're probably all looking forward to a fresh start in 2021. Well, I hope you enjoyed learning about what 2020 enforcement looked like. And thank you for listening to this episode of the GT ABC podcast. [inaudible].