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## Q4 2020: Latin America Enforcement Review

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As 2020 drew to a close, enforcement authorities throughout the United States and the Americas continued to investigate fraud, corruption, and other misconduct across the region. Below, we highlight some developments from the fourth quarter of 2020 and update our prior observations from earlier in the year.

### SIGNIFICANT FCPA RESOLUTIONS TO CLOSE OUT 2020: VITOL AND J&F INVESTIMENTOS

#### *Vitol Inc.*

On December 3, Vitol Inc., a U.S.-based affiliate of the Swiss energy trading group, entered into a deferred prosecution agreement with the United States Department of Justice (DOJ) to resolve civil and criminal charges that the company conspired to violate the anti-bribery provisions of the Foreign Corrupt Practices Act (FCPA) by bribing officials in Brazil, Ecuador, and Mexico<sup>1</sup>. The company agreed to pay \$135 million to resolve DOJ's investigation as well as a parallel investigation in Brazil by the Ministério Pùblico Federal, the Brazilian Federal Prosecution Service (MPF). Vitol also agreed to disgorge \$12.7 million to the Commodity Futures Trading Commission (CFTC) in a related matter and to pay the CFTC a penalty of \$16 million. The Vitol resolution represents the first coordinated FCPA enforcement action between DOJ and the CFTC and is the first action brought by the CFTC involving foreign corruption.<sup>2</sup> Citing Vitol's "full cooperation" during the investigation, DOJ sought a criminal penalty below the range suggested by U.S. Sentencing Guidelines.<sup>3</sup> In Brazil, Vitol Group entered a Leniency Agreement with the MPF also on December 3, under which the group agreed to pay approximately \$43.4 million to state-owned oil company Petroleo Brasileiro S.A. for damages.

According to the Statement of Facts docketed with the DOJ Deferred Prosecution Agreement, between 2005 and 2014, Vitol paid bribes of more than \$8 million to at least four officials at Petrobras, in exchange for confidential pricing and competitor information. Vitol and its co-conspirators also entered into consulting agreements to make payments



to Petrobras employees. Vitol further admitted to a conspiracy to bribe officials in Ecuador and Mexico between 2015 and 2020 related to purchases and sales of commodities.

Vitol's FCPA settlement follows the September 2020 indictment and arrest of Javier Aguilar, a Vitol trader. Aguilar was charged in a two-count indictment with conspiracy to violate the FCPA and to commit money laundering and is accused of paying \$870,000 in bribes to officials in Ecuador to help obtain a contract with Petroecuador, a state-owned energy company. As part of its investigation of Vitol, DOJ had previously unsealed plea and cooperation agreements with other individuals, including Rodrigo Berkowitz, a Houston-based former Petrobras employee who was one of the intermediaries involved in the scheme.

#### **J&F Investimentos**

Also in Q4, on October 14, a Brazilian investment holdings company, J&F Investimentos SA pleaded guilty and agreed to pay a fine of approximately \$256 million to resolve an investigation into violations of the FCPA. The investigation into J&F was conducted by the DOJ Criminal Division's Fraud Section at DOJ and the U.S. Attorney's Office for the Eastern District of New York.<sup>4</sup>

The U.S. charged that between 2005 and 2017, J&F Investimentos SA bribed Brazilian government officials to secure deals with state-controlled entities, meeting in New York and using bank accounts in New York to facilitate certain some of the payments, which included the purchase of an apartment in Manhattan.

According to the allegations, between 2005 and 2014, J&F made more than \$148 million in corrupt payments to high-level Brazilian government officials, including to an executive at Banco Nacional de Desenvolvimento Econômico e Social (BNDES) and Caixa Economica Federal, both of which are state-owned and state-controlled banks, in order to obtain financing, as well as making payments to Petrobras de Seguridade Social, a Brazilian state-controlled pension fund, to ensure approval of a merger that benefited J&F.

As part of the resolution, J&F pleaded guilty to one count of conspiracy to violate the anti-bribery provision of the FCPA. The \$256 million resolution payment reflects a reduction from the U.S. Sentencing Guidelines range, which reduction DOJ credited to J&F's cooperation and remediation efforts. Approximately \$128.2 million of the total fine will be paid to the U.S. government, and the remainder will be paid to the Brazilian government.

In a related matter with the U.S. Securities and Exchange Commission (SEC) announced on the same day, JBS S.A., a J&F majority-owned subsidiary, agreed to pay the SEC disgorgement and prejudgment interest totaling approximately \$27 million.

With these settlements, 2020 became DOJ's largest year for FCPA recoveries, with resolutions totaling nearly \$3 billion.<sup>5</sup> The Vitol and J&F settlements also brought total FCPA penalties to over \$20 billion since the inception of the FCPA in 1977.<sup>6</sup> The resolutions also demonstrate that, despite the challenges to international investigations posed by the pandemic, enforcement authorities in the U.S. and Brazil continue to cooperate in bringing major multijurisdictional cases.

#### **THE FUTURE OF OPERATION CAR WASH**

In our last Quarterly Enforcement Review, we discussed the recent developments of Operation Car Wash in Brazil in light of Brazilian President Jair Bolsonaro's declaration that corruption in Brazil had been eradicated and that Operation Car Wash would come to an end. This declaration followed the resignation of former federal judge Sergio Moro as Justice Minister in April 2020. In November, Moro joined a consulting firm that is currently serving as the judicially appointed administrator of OAS and Odebrecht, two of the contractors implicated in Operation Car Wash, both of which are now in court-approved bankruptcy and restructuring procedures.



As noted in our last Enforcement review, Brazil's prosecutors continue to pursue enforcement actions at a steady pace. The leniency agreement with Vitol, described above, was the 17th agreement entered into in the context of the Operation Car Wash. Considering the collaboration and reparation agreements obtained in the almost 7 years of the Operation, the total agreements achieved in Brazil now exceed \$2.74 billion, of which nearly \$1 billion has been returned to victims as restitution.<sup>7</sup>

In December 2020, Brazil's Office of the Prosecutor General extended Operation Car Wash through January 2021 in the state of Rio de Janeiro and October 2021 in the state of Parana. Currently, Brazilian authorities are prosecuting more than 400 cases related to Operation Car Wash.<sup>8</sup>

#### **U.S. RELEASES FORMER MEXICAN DEFENSE MINISTER CIENFUEGOS**

On November 17, United States Attorney General William Barr moved to dismiss the case against Mexico's former Secretary of National Defense, General Salvador Cienfuegos. Cienfuegos was arrested on October 15, 2020 following a narcotics investigation in Mexico that used wiretaps to track a military figure allegedly helping the drug cartel move narcotics in Mexico. At the time of his arrest, a sealed indictment handed down by a grand jury in the Eastern District of New York related to crimes allegedly committed between December 2015 and February 2017 became public.

General Cienfuegos was the Defense Minister throughout the administration of President Enrique Peña Nieto, who left office two years ago following the election of Andrés Manuel López Obrador. Cienfuegos was the first high-ranking military official to be taken into custody in the United States in connection with drug-trafficking and money-laundering charges.<sup>9</sup> His arrest came ten months after another high-profile former Mexican official, Genaro García Luna, was indicted in New York on charges of taking bribes while in office to protect one of Mexico's most powerful drug cartels, the Sinaloa cartel. García Luna was the head of Mexico's Federal Investigation Agency—an equivalent of the U.S. Federal Bureau of Investigation—from 2001 to 2005 and also served as Mexico's Secretary of Public Security for six years, helping the then-president Felipe Calderón to create his strategy to combat the drug cartels. García Luna is currently awaiting trial in New York.

DOJ's decision to release Cienfuegos cited "sensitive and important" foreign policy considerations that outweighed the U.S. government's interest in pursuing the charges. A spokesperson for DOJ said the case was dismissed in a sign of confidence in the Mexican judicial process and due to diplomatic considerations.<sup>10</sup> Cienfuegos returned to Mexico on November 18, after a U.S. federal judge dismissed charges against him. The decision to release and return Cienfuegos to Mexico underscores the delicate relationship between the U.S. and Mexico, whose shared border and overlapping national security concerns continue to be impacted by ongoing drug trafficking and other illegal activity. We anticipate cooperation between the United States and Mexico related to investigation and prosecution of drug and other related offenses (e.g., money laundering) in 2021.

#### **DEVELOPMENTS IN WHISTLEBLOWER PROGRAMS: THE SEC AND THE AML WHISTLEBLOWER PROGRAMS**

In November 2020, the SEC Office of the Whistleblower released its 2020 Annual Report. The Program, now in its tenth year of existence since its inception under the Dodd-Frank Wall Street Reform and Consumer Protection Act, reported record-breaking numbers of tips received, claims processed, and dollars awarded to whistleblowers.

During FY 2020, the Report identified that the Commission received over 6,900 whistleblower tips. This figure represents the largest number of whistleblower tips received in a fiscal year, and the largest component of those hints were related to corporate disclosures and financials. On October 22, 2020, after the end of FY 2020, the Commission issued the largest award to date under the Program, granting a \$114 million award to a whistleblower.<sup>11</sup>



According to the Report, since the beginning of the Whistleblower Program, the Commission has received tips from individuals in approximately 130 countries outside the U.S., and in FY 2020 alone, the Commission received submissions from individuals in 78 foreign countries. Brazil, Chile, Colombia and Mexico are listed among the top countries from where the whistleblower tips came in 2020.

On September 23, 2020, the Commission voted to adopt certain amendments to the Whistleblower Rules, which became effective on December 7, 2020. The general purpose of the amendments is to increase efficiencies related to the review and processing of claims and to provide more tools to the Commission to reward whistleblowers. One of the amendments allows awards based on deferred prosecution agreements and non-prosecution agreements entered into by DOJ and settlement agreements by the SEC outside of the context of a judicial or administrative proceeding to address violations of the securities laws, in an attempt to ensure that whistleblowers will not be disadvantaged because of the form or venue of an enforcement action that the DOJ or the SEC may choose to pursue.

Recent development in whistleblower programs are not limited to the SEC, however. On December 11, 2020, following negotiations between the Senate and the House of Representatives, the U.S. Senate passed the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (NDAA), which includes the Corporate Transparency Act (CTA) and the Anti-Money Laundering Act of 2020 (AMLA). The House of Representatives passed this version of the NDAA on December 8, 2020.

On January 1, 2021, the US Senate voted to override President Donald Trump's veto of the NDAA, allowing for the CTA and AMLA to bring about the most significant changes to U.S. anti-money laundering requirements since the USA Patriot Act of 2001. As we reported,<sup>12</sup> the CTA and AMLA broaden the mission or purpose of the Bank Secrecy Act (BSA), including by establishing a new BSA/anti-money laundering whistleblower program.

Modelled after the SEC's Whistleblower Program, the program created by the AMLA substantially expands the current AML whistleblower program by increasing the current awards – which vary between \$150,000 or 25 percent of the penalty, whichever is lower – to up to 30 percent of the monetary penalties assessed against a company when a tip leads to penalties that exceed \$1 million resulting from a judicial, administrative, or related action.<sup>13</sup> The new section also includes detailed provisions on protecting whistleblowers in the event of retaliation from their employers.

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<sup>1</sup> *Vitol Inc. Agrees to Pay over \$135 Million to Resolve Foreign Bribery Case*, <https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case>, U.S. Dep't of Justice (December 3, 2020)

<sup>2</sup> *CFTC Orders Vitol Inc. to Pay \$95.7 Million for Corruption-Based Fraud and Attempted Manipulation*, <https://cftc.gov/PressRoom/PressReleases/8326-20>, U.S. Commodity Futures Trading Commission (December 3, 2020)

<sup>3</sup> <https://www.ft.com/content/e9eb710c-e8a3-4dfa-b85e-821e9fcc8f2e>

<sup>4</sup> *J&F Investimentos S.A. Pleads Guilty and Agrees to Pay Over \$256 Million to Resolve Criminal Foreign Bribery Case*, <https://www.justice.gov/opa/pr/jf-investimentos-sa-pleads-guilty-and-agrees-pay-over-256-million-resolve-criminal-foreign>, U.S. Dep't of Justice (October 14, 2020)

<sup>5</sup> *With J&F, 2020 becomes the biggest year in FCPA history*, fcpablog.com, <https://fcpablog.com/2020/10/19/with-jf-2020-becomes-the-biggest-year-in-fcpa-history/> (October 19, 2020)

<sup>6</sup> *Id.*

<sup>7</sup> *Lava Jato: Vitol fecha acordo de leniência que prevê pagamento de R\$ 232 milhões à Petrobras*, Globo.com, Considering the collaboration and reparation agreements, the total exceeds R \$ 14.6 billion, of which R \$ 4.3 billion have already been effectively returned to the victims. (December 3, 2020)

<sup>8</sup> *PGR prorroga forças-tarefa da Lava Jato no Paraná e no Rio de Janeiro*, Globo.com, <https://g1.globo.com/politica/operacao-lava-jato/noticia/2020/12/07/pgr-prorroga-forcas-tarefa-da-lava-jato-no-pr-e-no-ri-mas-define-integracao-com-outros-grupos.htm> (December 7, 2020)

<sup>9</sup> *Mexico's Former Defense Minister Is Arrested in Los Angeles*, The New York Times, <https://www.nytimes.com/2020/10/16/us/mexico-general-cienfuegos-dea.html> (October 16, 2020)

<sup>10</sup> *Exclusive: Mexico agreed with U.S. Attorney General Barr to arrest drug capo in deal for general* – source, Reuters, <https://www.reuters.com/article/us-usa-mexico-corruption-exclusive/exclusive-mexico-agreed-with-us-attorney-general-barr-to-arrest-drug-capo-in-deal-for-general-source-idUSKBN28100W> (November 20, 2020)

<sup>11</sup> Securities and Exchange Commission, Order Determining Whistleblower Award Claim, Exchange Act Rel. No. 90247, File No. 2021-2 (October 22, 2020), available at <https://www.sec.gov/rules/other/2020/34-90247.pdf>

<sup>12</sup> *New BSA/AML Regime Promises Sweeping Changes*, <https://www.jdsupra.com/legalnews/new-bsa-aml-regime-promises-sweeping-36918/>, December 23, 2020

<sup>13</sup> See 31 U.S.C. § 5323.