

Webcast: FCPA Trends in the Emerging Markets of Asia, the Middle East and Africa

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MCLE Certificate Information

Most participants should anticipate receiving their certificate of attendance in three to four weeks following the webcast.

Our National Training Administrator will follow up with you regarding your credit.

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Questions regarding MCLE information should be directed to Jeanine McKeown (National Training Administrator) at 213-229-7140 or jmckeown@gibsondunn.com.



Topics to Be Discussed

- **An Overview of the FCPA and its Enforcement**
- **Emerging Market Trends: China, the Middle East & Africa, and India**
 - China: Anti-Corruption Enforcement & Trends
 - Middle East and Africa: Anti-Corruption Enforcement & Trends
 - India: Anti-Corruption Enforcement & Trends
- **Global Trends and Risk Mitigation Strategies**





An Overview of the FCPA and its Enforcement

Overview: FCPA

What is the Foreign Corrupt Practices Act?

The FCPA was enacted in 1977 in the wake of reports that numerous U.S. businesses were making large payments to foreign officials to secure business.



- ***Anti-Bribery Provisions:*** The FCPA prohibits corruptly giving, promising, or offering anything of value to a foreign government official, political party, or party official with the intent to influence that official in his or her official capacity or to secure an improper advantage in order to obtain or retain business.
- ***Accounting Provisions:*** The FCPA also requires issuers to maintain accurate “books and records” and reasonably effective internal controls.

FCPA: Who is Covered by the FCPA?

- **Issuers:** Any company whose securities (including American Depositary Receipts and registered debt) are registered in the United States or that is required to file periodic reports with the SEC.
 - The FCPA also applies to stockholders, officers, directors, employees, and agents acting on behalf of the issuer.
 - Issuers must adhere to both the FCPA's *Anti-Bribery* and *Accounting Provisions*.
- **Domestic Concerns:** Any individual who is a U.S. citizen, national, or resident of the United States (not just U.S. citizens), or any business organization that has its principal place of business in the United States or which is organized in the United States.
 - The FCPA also applies to stockholders, officers, directors, employees, and agents acting on behalf of the domestic concern.
 - Domestic Concerns must adhere to the FCPA's *Anti-Bribery Provisions*.
- **Other Persons:** Anyone who takes any act in furtherance of a corrupt payment while within the territory of the United States.
 - "Other Persons" must adhere to the FCPA's *Anti-Bribery Provisions*.

Definition of “Foreign Official”

The FCPA prohibits corrupt payments to “foreign officials,” which is defined expansively to include:

- Any officer or employee (including low-level personnel) of a foreign government department or agency;
- Personnel of an “instrumentality” of a foreign government, which has been construed to include employees of government-owned or government-controlled businesses and enterprises;
- Personnel of public international organizations, such as the United Nations, World Bank or other international financial institutions, the Red Cross, and others;
- Political party officials and candidates; and
- Members of royal families.

Eleventh Circuit Adopts Broad Definition of “Instrumentality”

In *U.S. v. Esquenazi*,* the 11th Circuit defined an “instrumentality” as an entity that 1) is **controlled** by the foreign government and 2) performs a **function the government treats as its own**.

According to the court, characteristics of a “controlled” entity may include:

- Government’s formal **designation**;
- Government **ownership stake**;
- Government’s ability to **hire and fire the entity’s principals**;
- Extent to which the entity’s **profits go to the government**; and
- Extent to which **government funds** the entity.

Characteristics of an entity that performs a government function may include:

- Whether the entity has a **monopoly** over the function;
- Whether the entity receives **government subsidies**;
- Whether the entity provides **services to the public** at large; and
- Whether the public and the government **perceive** the entity to be performing a public function.



FCPA: What Types of Payments are Prohibited?

- **The FCPA prohibits not only actual payments, but also any offer, promise, or authorization of the provision of anything of value.**
 - No payment needs to be made nor benefit bestowed for liability to attach.
 - An offer to make a prohibited payment or gift, even if rejected, is a violation of the FCPA.
- **The FCPA also prohibits indirect corrupt payments.**
 - The FCPA imposes liability if a U.S. company authorizes a payment to a third party while “knowing” that the third party will make a corrupt payment.
 - Third parties include local agents, consultants, attorneys, subsidiaries, etc.
- **Political or Charitable contributions can violate the FCPA.**

FCPA: What Constitutes a “Thing of Value”?

- There is no “de minimis” exception.
- It is not limited to tangible items of economic value.
- It can include anything a recipient would find interesting or useful, including:

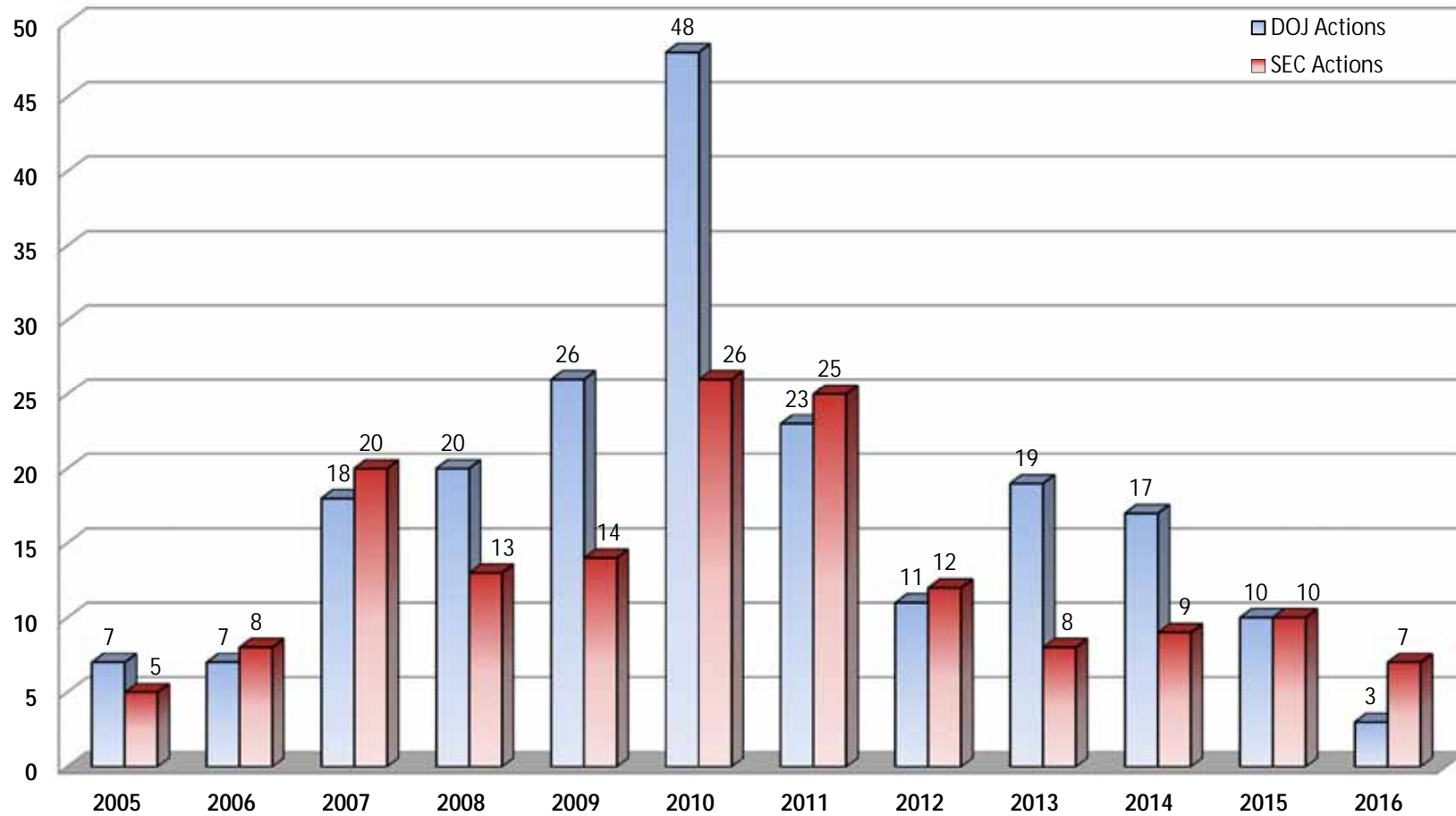
- Gifts
- Sporting Event Tickets
- Entertainment
- Food and Wine
- Meals
- Internships
- Professional Training
- Trips
- Loans
- Employment
- Consulting Fees
- Mobile phones and electronic devices
- Education
- Political or Charitable Contributions

“As part of an effective compliance program, a company should have clear and easily accessible guidelines and processes in place for gift-giving by the company’s directors, officers, employees, and agents.”

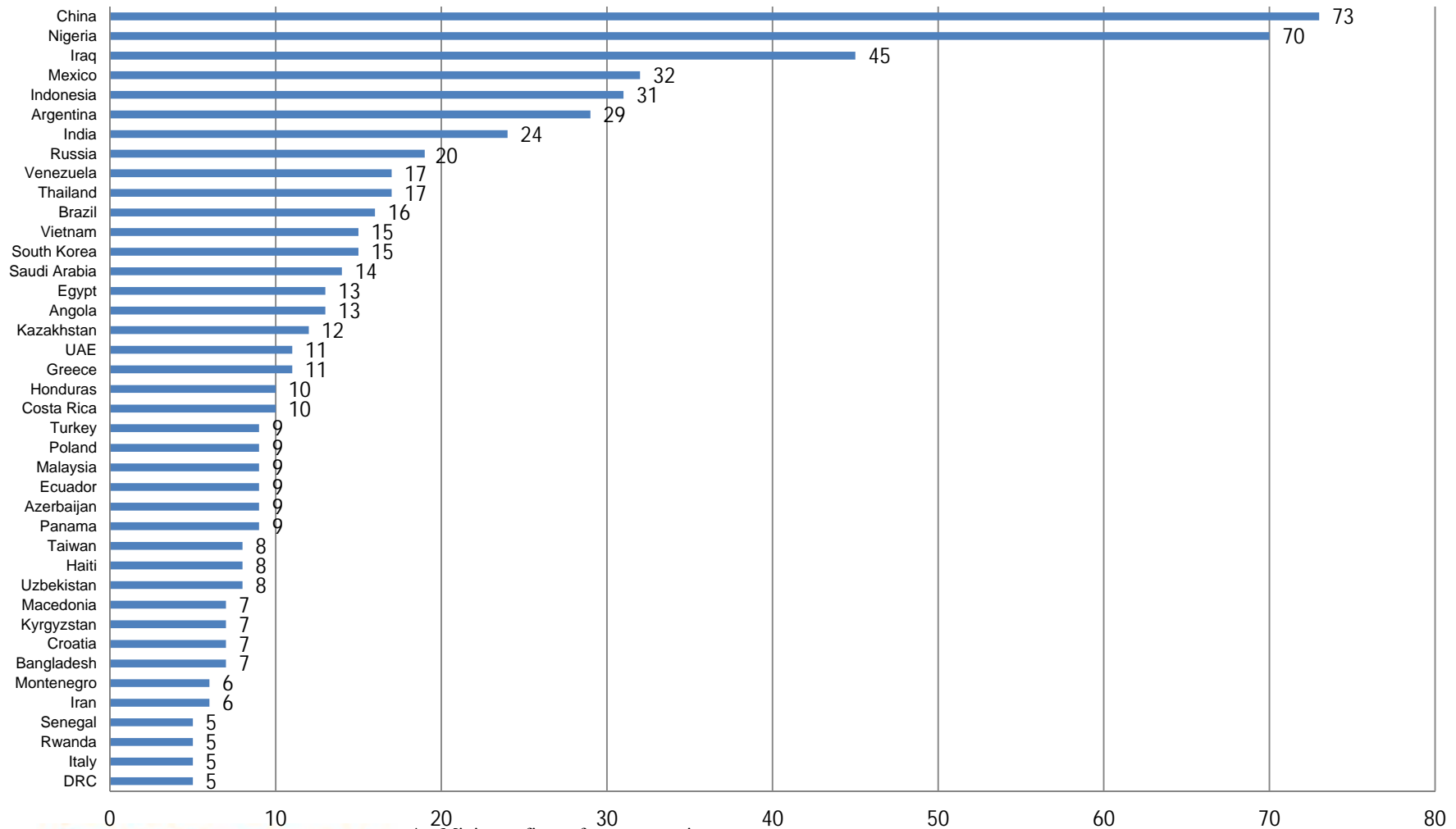
-A Resource Guide to the U.S. Foreign Corrupt Practices Act (p.16).



FCPA Enforcement Actions Per Year (2005-2016*)



Number of FCPA Enforcement Actions by Region (2005 to 2016*)



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* Minimum five enforcement actions.

** As of March 7, 2016

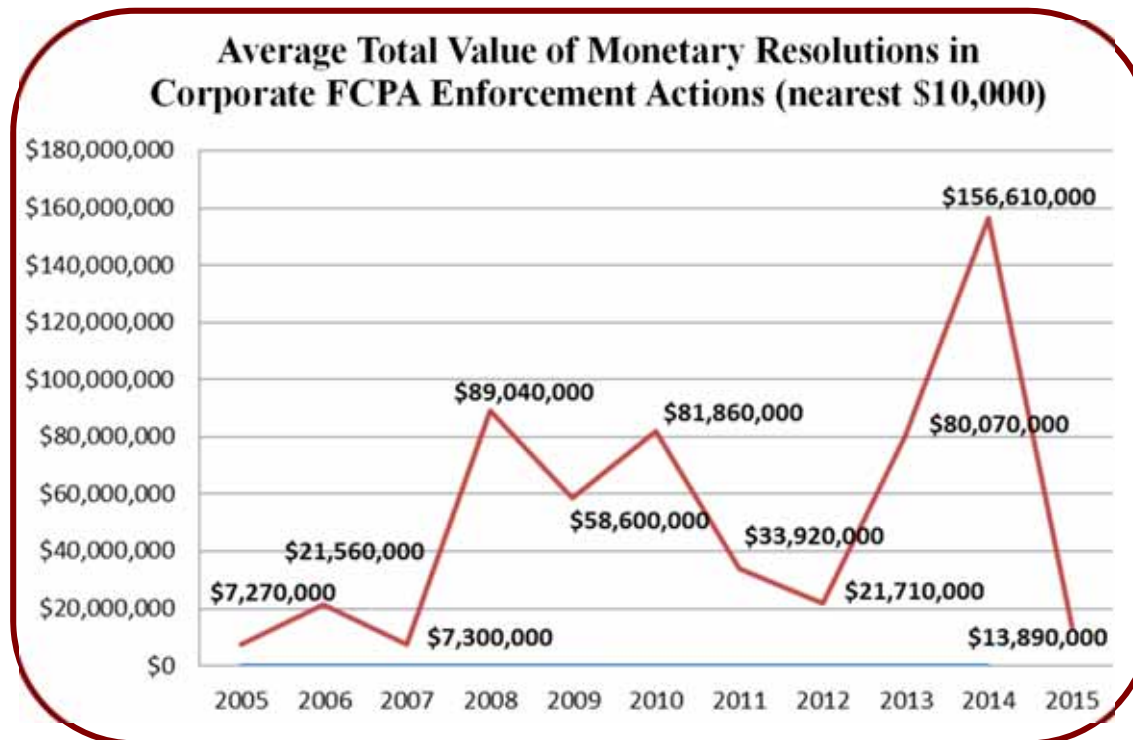
Enforcement of the FCPA: Criminal Penalties

Anti-Bribery Provisions

- *Corporations*: \$2 million fine *or* twice the pecuniary gain or loss.
- *Individuals*: Up to five years' imprisonment *and* a \$250,000 fine *or* twice the pecuniary gain or loss.

Books and Records Provisions

- *Corporations*: Criminal penalties up to a \$25 million fine.
- *Individuals*: Up to 20 years' imprisonment, and a \$5 million fine.



Money Matters

U.S. enforcement authorities have obtained over **\$6.7 billion** in penalties, fines, and disgorgement under the FCPA since 2004.

The average value of a corporate FCPA enforcement action has dipped below the **\$20 million** mark only three times since 2004.

Recent Blockbuster Enforcement Actions

Three of the top ten largest monetary settlements in FCPA history were reached in 2014 and 2016. All but two were reached after 2010.

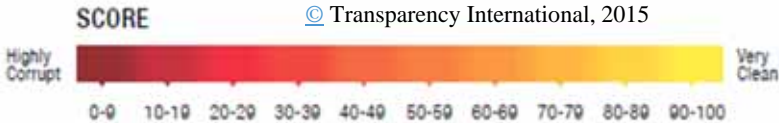
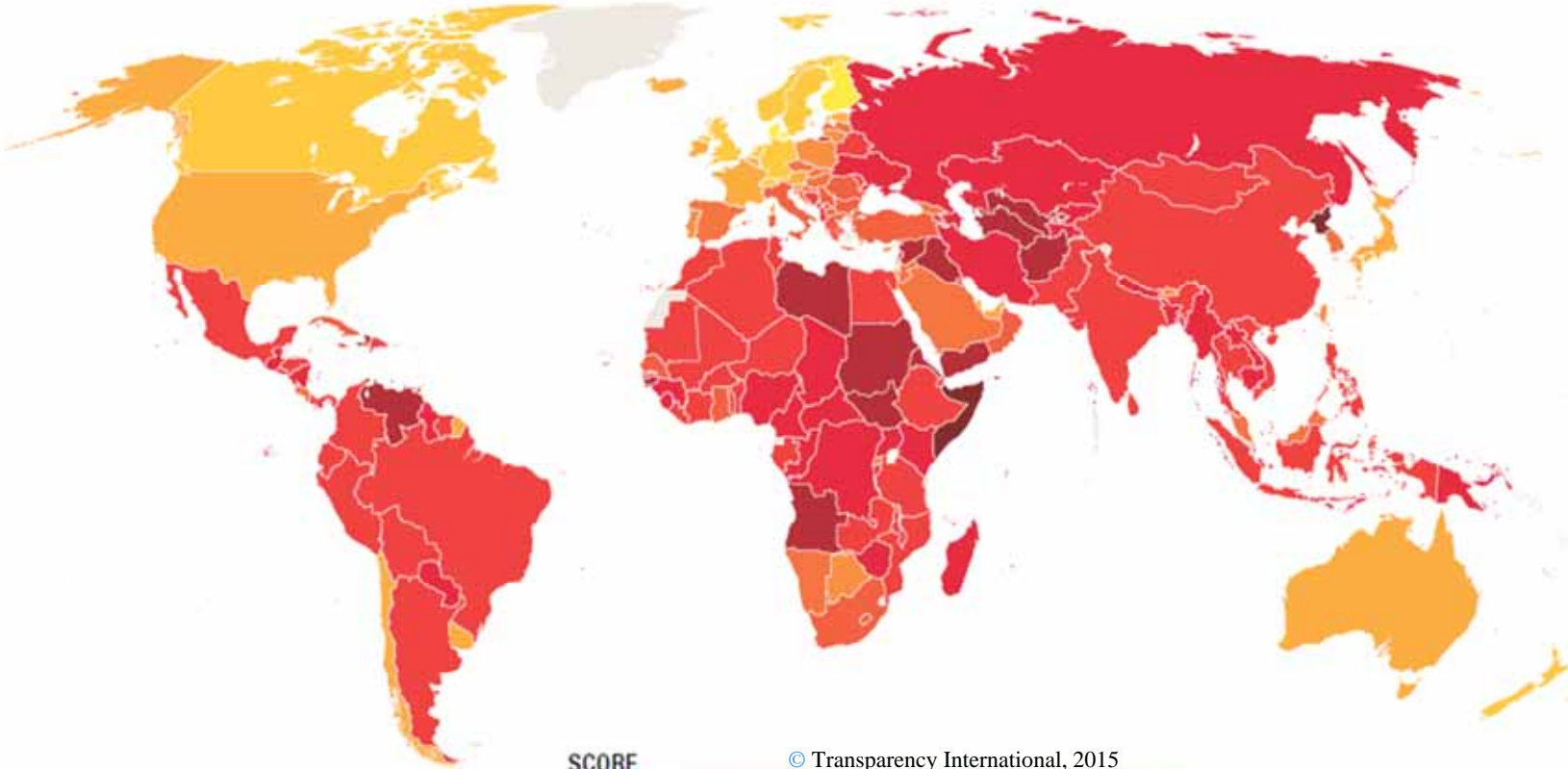
No.	Company	Total Resolution	DOJ Component	SEC Component	Date
1	Siemens AG*	\$800,000,000	\$450,000,000	\$350,000,000	12/15/2008
2	Alstom S.A.	\$772,290,000	\$772,290,000	--	12/22/2014
3	KBR/Halliburton	\$579,000,000	\$402,000,000	\$177,000,000	2/11/2009
4	BAE Systems**	\$400,000,000	\$400,000,000	--	2/4/2010
5	Total S.A.	\$398,200,000	\$245,200,000	\$153,000,000	5/29/2013
6	VimpelCom Ltd.***	\$397,600,000	\$230,100,000	\$167,500,000	2/18/2016
7	Alcoa	\$384,000,000	\$223,000,000	\$161,000,000	1/9/2014
8	Snamprogetti/ENI	\$365,000,000	\$240,000,000	\$125,000,000	7/7/2010
9	Technip S.A.	\$338,000,000	\$240,000,000	\$98,000,000	6/28/2010
10	JGC Corp.	\$218,800,000	\$218,800,000	--	4/6/2011

* Siemens's U.S. FCPA resolutions were coordinated with a €95 million (\$569 million) anti-corruption settlement with the Munich Public Prosecutor.

** BAE pleaded guilty to non-FCPA conspiracy charges of making false statements and filing false export licenses, but the alleged false statements concerned the existence of the company's FCPA compliance program, and the publicly reported conduct concerned alleged corrupt payments to foreign officials.

*** VimpelCom's resolutions were coordinated with a \$397.5 million settlement to Dutch regulators.

Global Emerging Market Trends



China: Market Characteristics



1.4 billion

Estimated population of China in 2015. High median age (36.8).

\$593.2 billion

China's foreign trade surplus in 2015.

6.3%

China's projected GDP growth rate for 2016. GDP is expected to grow **2.8%** in the U.S. and **2.9%** worldwide during 2016.



\$2.27 trillion

Total value of exports in 2015.

90 million

Expected reduction of working age population between 2010 and 2040 primarily due to low fertility rate.

\$126.3 billion

Total inbound FDI in 2015.

Sources: Worldometers: *China Population 2015*; CIA World Factbook: *China*; General Administration of Customs: *Access to Public Information - Customs Statistics*; World Economic Outlook: *Uncertainty, Complex Forces Weigh on Global Growth* (Oct. 6, 2015); *China Working Age Population 'to Fall 10% by 2040*, FT (Dec. 9, 2015); MOFCOM Data Center.

Middle East & North Africa: Market Characteristics

Middle East's Uncertain Financial Future

- Oil price collapse has led to slowed Gulf Cooperation Council (“GCC”) growth (down from 3.25% to 2.6%), uncertainty in M&A markets and projects, increased focus on economics (sometimes at price of best practices) an impact on governmental institutions (as active economic players).
- Political geopolitical instability and terrorism have also contributed to decreased FDI.
- Iran as potential new market.



385 million	Estimated MENA population.
\$2.92 trillion	MENA’s estimated GDP in 2015.
2.8%	MENA projected GDP growth rate for 2016.
3.3%	MENA projected GDP growth rate for 2017.
185 million	Projected size of MENA workforce in 2020, up from 146 million in 2010.
\$121 billion	Total inbound FDI in 2014 (up 22%).
\$38 billion	Total outbound FDI in 2014 (down 21%).
\$340 billion	Lost revenues due to oil price collapse, 24% of GCC GDP.

Africa: Market Characteristics

Africa's Financial Future

- Decreased commodity prices have affected a number of new infrastructure projects and related FDI.
- Political instability, lack of governance, and corruption still seen as major issues for investors.
- Rapid urbanization and growing consumer class will also drive growth.
- Infrastructure, consumer-facing goods (specifically TMT, financial services, and retail), and agriculture are expected to be driving investments.



1.186 billion

Estimated population of Africa in 2015.

\$1.73 trillion

Africa's estimated GDP in 2015.

4.4%

Sub-Saharan Africa's projected GDP growth rate for 2016. GDP is expected to grow 3.3% worldwide during 2016.

450 million

Number of workers projected to join the workforce between 2010 and 2035.

\$38 billion

Total inbound FDI in 2015—decline of 31% from 2014 figure of USD53.9 billion.

India: Market Characteristics



1.25 billion

Estimated population of India in 2015—set to match and possibly exceed China by 2022. Low median age (27.3).

-\$7.9 billion

India's foreign trade deficit in January 2016.

7.5%

India's projected GDP growth rate for 2016 is expected to match 2015's rate. GDP expected to double by 2018.

\$310.3 billion

Total value of 2014-2015 exports (India calendar year).

12 million

The number of people who enter India's work force each year.

“What is the aim of reform? Is it just to increase the measured rate of GDP growth? Or is it to bring about a transformation in society? My answer is clear. We must reform to transform.”
- Prime Minister Narendra Modi (Nov. 7, 2015)

Sources: CIA World Factbook: India.; UN: India to Overtake China's Population by 2022, BBC NEWS ASIA (July 30, 2015); Trading Economics, India Balance of Trade; IMF, World Economic Outlook Update, T1; India's GDP Can Double in 3 Years: Railway Minister Suresh Prabhu, NDTV (Aug. 21, 2015); India Department of Commerce, Export: Country-wise; Indian Economy Better Placed Today, Reforms Will be Pursued: PM Narendra Modi, THE ECONOMIC TIMES (Nov. 7, 2015); The Numbers, India's Labor Force, THE WALL STREET JOURNAL (July 22, 2015).



CHINA

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China's Corruption Landscape

83rd

When the anti-corruption campaign is in its third year, China has scored 37 (up from 36 in 2014), and has improved its rank from 100th to 83rd.



110,000

Corruption cases handled by Chinese prosecutors from 2013 to August 2015.

16,000

Corruption cases concluded by Chinese courts nationwide in 2015.

1,536

Officials since investigated for corruption from September 2012 to mid-February 2016.

¥6.3bn

Value of funds and assets embezzled or misused by sentenced officials since August 2012.

155

Officials at or above the provincial or ministerial level investigated for corruption since August 2012.

Sources: Transparency Int'l, Corruption Perceptions Index (2015); *Chinese Prosecutors Probe 54,000 Officials for Graft, Negligence in 2015*, CHINA DAILY (Jan. 25, 2016); *China Prosecutors Investigate 140,000 Suspects in Anti-Graft Drive*, XINHUA NEWS (Sept. 21, 2015); *Catching Tigers and Flies*, <https://anticorruption.chinafile.com/> (last accessed Feb. 28, 2016); *China Punishes 249 Officials for Laziness during Corruption Crackdown*, THE GUARDIAN (Sept. 29, 2015); “最高检发布”今年已发布职务犯罪案件信息445条, 正义网-检察日报 (Dec. 8, 2015), http://news.jcrb.com/jxsw/201512/t20151208_1571779.html.

FCPA Enforcement Actions in China

Since 2002, the DOJ and the SEC have brought enforcement actions against 36 corporations relating to business activities in China:

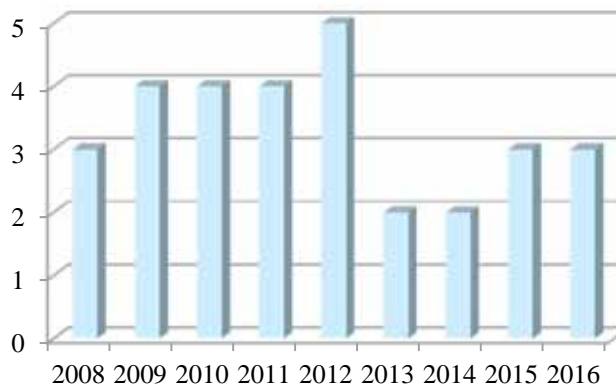
- InVision Technologies, 2004
- Diagnostic Products Corp., 2005
- Schnitzer Steel Industries, 2006
- Paradigm BV, 2007
- York International, 2007
- Alcatel-Lucent, 2007
- AGA Medical, 2008
- Faro Technologies, 2008
- Siemens AG, 2008
- ITT Corporation, 2009
- Avery Dennison, 2009
- Control Components, Inc., 2009
- UTStarcom, Inc., 2009
- Daimler AG, 2010
- Veraz Networks, Inc., 2010
- Alliance One International, 2010
- RAE Systems, Inc., 2010
- IBM Corp., 2011
- Maxwell Technologies, 2011
- Rockwell Automation, 2011
- Watts Water Technologies, Inc., 2011
- Biomet, Inc., 2012
- Pfizer/Wyeth, 2012
- Nordam Group, Inc., 2012
- Tyco, 2012
- Eli Lilly, 2012
- Keyuan Petrochemicals, Inc., 2013
- Diebold, Inc., 2013
- Bruker Corp., 2014
- Avon Products (China) Co., Ltd, 2014
- **BHP Billiton, 2015**
- **Mead Johnson Nutrition, 2015**
- **Bristol-Myers Squibb, 2015**
- **SciClone Pharmaceuticals, 2016**
- **PTC Inc., 2016**
- **Qualcomm Inc., 2016**

No. 1: In the past decade, the number of enforcement actions involving conduct in China ranks No.1, surpassing those involving conduct in Nigeria.

FCPA Enforcement Actions in China (cont'd)

At least 24 China-related investigations are underway:

Number of companies that resolved China-related DOJ/SEC enforcement actions from 2008-2016. After a brief dip, the trend appears to be once again on the rise.



Recurring risk patterns in ongoing investigations are:

Risk Areas	Company Disclosures
Pharmaceuticals / Personal Care	AstraZeneca, GlaxoSmithKline, Grifols, Novartis, Nu Skin
Whistleblower Allegations	NCR Corp., Wal-Mart
Gift, travel and entertainment to government officials	Harris Corp., MTS Systems, Nortek, SL Industries
Sales / Marketing / Payment Practices	AstraZeneca, General Cable, GlaxoSmithKline, Grifols, Nortek, Sciclone, United Technologies
Third Parties	AstraZeneca, General Cable, Harris Corp., Novartis, Rolls Royce, Sensata Technologies, United Technologies
Employee Hiring Practices	Chase, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan

24 Disclosed Investigations

AstraZeneca, Delphi Automotive, Deutsche Bank, Dun & Bradstreet, General Cable, GlaxoSmithKline, Goldman Sachs, Grifols, HSBC, Harris Corp., Ingersoll-Rand, Johnson Controls, JPMorgan Chase, Las Vegas Sands, MTS Systems, NCR Corp., Nortek, Novartis, Nu Skin Enterprises, Rolls Royce, Sensata Technologies, SL Industries, United Technologies, Wal-Mart

China-Related FCPA Enforcement Actions in 2015

SEC: Bristol-Myers Squibb

- Bristol-Myers Squibb's JV in China allegedly provided **cash, other gifts, meals, travel, entertainment, and sponsorships for conferences and meetings to health care providers ("HCPs") at state-owned hospitals** in exchange for prescription sales, and falsely recorded these transactions as legitimate business expenses.
- **Cost:** BMS paid more than \$14 million and will submit to a two-year compliance self-monitorship to settle FCPA accounting charges.

SEC: Mead Johnson Nutrition

- Mead Johnson's Chinese subsidiary allegedly provided **cash and other incentives** through "**distributor allowance**" funds to **HCPs at state-owned hospitals** in exchange for formula milk recommendations to new or expectant mothers, and did not accurately reflect the more than \$2M in improper payments in its books and records.
- **Cost:** Mead Johnson paid \$12 million to settle FCPA accounting charges.

SEC: BHP Billiton

- BHP Billiton allegedly offered tickets and other benefits in connection with the Beijing Olympic to **government officials**. Sponsored guests, primarily from countries in Africa and Asia, received **hospitality packages, including event tickets, luxury accommodations, and sightseeing excursions**.
- **Cost:** BHP paid a \$25 million penalty to settle FCPA accounting charges, and will self-report on the state of its compliance program to the SEC for one year.

Common Themes From 2015 Enforcement Actions

- *Healthcare*-sector focus;
- *Gifts, meals, travel, and entertainment* provided to government officials;
- *Speech engagements, sponsorships for conferences, meetings, and high-profile events*;
- *Inadequate procedures* to ensure meaningful preparation, review, and approval of hospitality requests;
- Use of *fake or altered invoices, receipts, and purchase orders* for expense reimbursement in connection with improper payments; and
- Use of *off-book slush funds in collusion with distributors*.

China-Related FCPA Enforcement Actions in 2016

SEC: SciClone Pharmaceutical

- SciClone's China-based subsidiaries allegedly gave **money, gifts, and other things of value to HCPs at state health institutions in China**, and inaccurately reflected these improper inducements in the company's books and records.
- **Cost:** SciClone agreed to pay over \$12.8 million in civil penalties, disgorgement and prejudgment interest and will submit to three years of remediation status reporting to settle FCPA anti-bribery and accounting charges.

SEC & DOJ : PTC Inc.

- PTC's Chinese subsidiaries provided **recreational travel and gifts** to Chinese government officials through local business partners, and falsely recorded these transactions as legitimate commissions or business expenses.
- The SEC entered into its **first individual deferred prosecution agreement in an FCPA case** with Yu Kai Yuan, a former PTC China employee, who agreed to cooperate throughout the three-year deferral period.
- PTC did not receive voluntary disclosure or full cooperation credit because it failed to disclose relevant facts at the time of its initial disclosure.
- **Cost:** PTC agreed to pay \$28 million in total to settle FCPA anti-bribery and accounting charges and entered into a three-year non-prosecution agreement.

SEC: Qualcomm Inc.

- Qualcomm allegedly offered or provided **employment and paid internships** to relatives of Chinese officials, and provided **frequent meals, gifts, and entertainment** to Chinese officials and their family members. Qualcomm allegedly misrepresented the things of value provided as legitimate business expenses in the company's books and records.
- **Cost:** Qualcomm agreed to pay a \$7.5 million penalty to settle FCPA anti-bribery and accounting charges, and agreed to a two-year self-monitorship.

Emerging Trends from Recent Enforcement Actions in 2016

- **Healthcare- and technology-sector** focus;
- **Money, gifts, and recreational travel** provided to government officials;
- **Employment and paid internships** provided to relatives of government officials;
- **Misconduct condoned by management;**
- **Full disclosure required** to receive voluntary disclosure or full cooperation credit; and
- **Expanded use of individual DPAs** to cover individuals.

Legislative Development in Anti-Corruption Areas

Nationwide

Latest Amendment to Criminal Law Anti-Corruption Provisions (effective Nov. 1, 2015)

- For the first time, criminalizes bribery of officials' close relatives or associates.
- Replaces specific monetary thresholds for official embezzlement charges with more flexible tiers for offenses involving “relatively large,” “huge,” and “especially huge” amounts.
- Adds monetary fines for all graft- and bribery-related offenses.
- Requires higher level of cooperation for leniency.

Proposed Amendment to Anti-Unfair Competition Law (Released Feb. 25, 2016)

- Clarifies that economic benefits not accurately reflected in contracts and accounting records are deemed commercial bribes.
- Clearly prohibits commercial bribery through third parties.
- Prohibits promising to offer and agreeing to accept commercial bribes, even where bribes are not actually given or accepted.
- Redefines penalties for commercial bribery to 10%-30% of illegal revenues.
- Adds penalties for obstruction of investigation.



Legislative Development in Anti-Corruption Areas

Healthcare Industry

New Rules Governing Donations to Healthcare Entities (Trial Implementation)

- Apply to PRC healthcare-related donees and domestic and foreign donors.
- Implement a broad definition of “donations” and impose limitations on use.
- Require donees to publicly disclose information regarding donations received.
- Prohibit donations involving commercial activities, unfair competition, or commercial bribery, or relating to the donee’s procurement of goods and services.
- Do not specifically address whether pharmaceutical or medical device companies’ sponsorship of hospital events are permissible.

Chinese Anti-Corruption Campaign: Domestic Enforcement

By the Numbers (2015):

- 33,966** Number of officials disciplined by CCDI in China for violations of the “Eight Rules” (embezzlement, bribery, abuse of power, misappropriation, dereliction of duty, and malpractice).
- 36,911** Number of cases investigated by CCDI for violations of the “Eight Rules.”
- 49,508** Number of officials investigated by CCDI for violations of the “Eight Rules.”

High-Ranking Officials Caught in the Anti-Corruption Crackdown:

- Former member of the CCP Politburo Standing Committee and former Minister of Public Security Zhou Yongkang sentenced to life in prison.
 - Former President Hu’s top aide, Ling Jihua, arrested and pending prosecution.
 - Allies of Zhou Yongkang, including Jiang Jiemin and Wang Yongchun, former top executives of CNPC and PetroChina, and former top officials from Sichuan province, sentenced to lengthy prison terms.
- From September 2012 to mid-February, 2016:
- **155** officials at or above the provincial or ministerial level investigated for corruption, including:
 - 44 from Beijing; and
 - 44 from the military.
 - **At least one top official in each of China’s 31 provinces has been ensnared in a corruption scandal.**

Chinese Anti-Corruption Laws

Chinese law punishes *both* the giving and taking of bribes. Chinese criminal law includes provisions criminalizing three types of bribery:

- 1. Official Bribery:** Criminalizes bribery of state organs, state functionaries, or *their close relatives or associates*.
 - Harsh penalties applicable, including the death penalty.
 - RMB 10,000+ triggers criminal liability for bribery; no minimum threshold for graft.
 - Criminal fines assessed for all official bribery offenses, regardless of whether the offender is an individual or an entity.
- 2. Commercial Bribery:** Criminalizes bribery of “staff of a company or enterprise” and imposes record-keeping obligations.
 - Employers are liable for the acts of their employees.
 - No exception for small facilitating payments.
- 3. Foreign Bribery:** Criminalizes bribery of “any foreign public official or official of an international public organization.”

Chinese Anti-Corruption Enforcement Agencies



**CPC
Discipline and
Inspection
Commissions**



**Procuratorates
(Prosecutor's
Offices)**



**Public
Security (Law
Enforcement)**



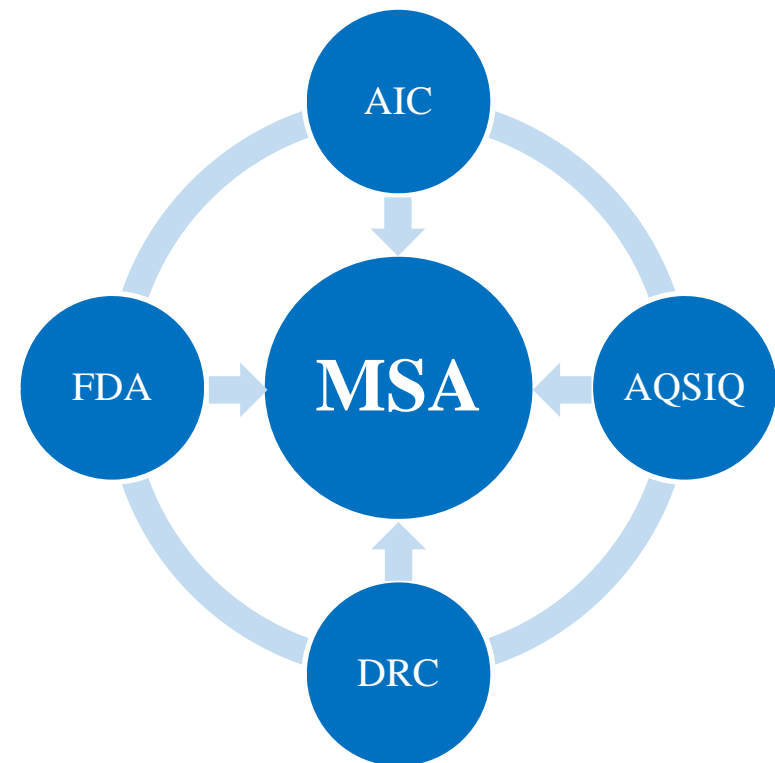
**State Administration
for Industry and
Commerce (“SAIC”)**

Enforcement Authority	Internal party discipline; expanded supervisory role	Criminal	Criminal	Administrative (commercial bribery); but can refer charges to criminal authorities
Investigating Powers (incl. Inspection, Raids)	Yes; expanded investigating powers over party heads of higher people’s courts and provincial-level procuratorates, leading ministerial officials; and top executives of key state-owned enterprises (“SOEs”) and financial institutions	Yes; New Anti-Corruption Bureau (“ACB”) established within the SPP (the national-level procuratorate), to centralize anti-corruption resources and overcome bureaucratic hurdles in handling significant corruption cases	Yes	Yes
Charging Powers	No; but can refer cases to Procuratorate	Yes	No; but can refer cases to Procuratorate	Yes
Enforcing Penalties	Quasi-judicial power, e.g., freezing bank accounts to maintain the status quo	No; determined by courts	No; determined by courts	Yes; including fines, confiscation of illegal income, potential blacklisting by government agencies
Other Enforcement Powers	Investigates crimes concerning public officials; can use “ <i>Shuanggui</i> ” (“double-designation”) against public officials	Prosecutes all crimes	Investigate crimes not concerning public officials	Antitrust, consumer rights, business registration, trademark infringement, advertising, direct sales, market and online transactions

China Enforcement Trend: Cross-Functional Regulatory Enforcement

- The developing Market Supervision Administration (“MSA”) combines the regulatory functions of several existing agencies:
 - **Administration of Industry and Commerce** (“AIC”) – Business registration, enforcement of Anti-Unfair Competition Law.
 - **Food and Drug Administration** (“FDA”) – Regulation and registration for drugs and medical devices, administration and supervision of food (including health food) safety.
 - **Administration of Quality Supervision, Inspection and Quarantine** (“AQSIQ”) – Importation controls on a wide range of products, entry-exit commodity inspection.
 - **Development and Reform Commission** (“DRC”) – Pricing supervision and inspection.

Administratively, it may be easier for companies to interact with a single regulatory body with a centralized structure. However, the broad power of a MSA to investigate a wide range of conduct may increase the risk that corruption investigations arise in tandem with other inquiries.



Chinese Anti-Corruption Campaign: Extraterritorial Efforts

China is broadening the territorial reach of its anti-graft campaign to apprehend corruption suspects and recover criminal assets overseas.

Apprehension of Overseas Fugitives

- China launched “Operation Fox Hunt” in 2014, followed by the “Sky Net” campaign in 2015. Both initiatives are aimed at tracking down corruption suspects overseas and recovering their ill-gotten assets.
- In 2015, 857 PRC nationals in 66 overseas countries or regions have been apprehended.

Anti-Money Laundering Efforts

- Chinese authorities are cracking down on underground banking and money laundering to prevent corrupt PRC officials from transferring their criminal assets overseas.
- Withdrawals at overseas ATMs are capped to stem capital outflows.

U.S.-China Cooperation

- The U.S. and China have agreed to increased cooperation on cybersecurity, corrupt and criminal asset discovery, and law enforcement.
- The U.S. repatriated its first Chinese corruption fugitive under the Sky Net campaign in 2015.
- The U.S. Treasury Department’s Financial Crimes Enforcement Network and its counterpart in China, the China Anti-Money Laundering Monitoring and Analysis Center, signed a MOU to expand AML cooperation.

China’s Capital Outflows

- China is the leading source of illicit outflows among developing countries, with nearly **\$1.4 trillion of illegal funds** transferred from China between 2003 and 2013.
- China noted a record **\$194 billion** in capital outflows in September 2015.

Sources: China and US to Co-operate on Corrupt Asset Seizures, Deportations, FT (Sept. 27, 2015); China, U.S. Sign Agreement to Expand AML Cooperation, FCPA BLOG (Dec. 14, 2015); Police Step Up Underground Banks Battle, CHINA DAILY (Oct. 16, 2015); China Cracks \$64 Billion ‘Underground Bank’ Moving Money Abroad, BLOOMBERG (Dec. 16, 2015); 857 Fugitives Captured in “2015 Fox Hunt” Campaign (“猎狐2015”收官共抓获外逃人员857名), XINHUA NEWS (Jan. 27, 2016).

Chinese Anti-Corruption Campaign: Whistleblowing on the Rise

- **Four out of five** corruption investigations in China reportedly originated from whistleblower tips.
- Chinese authorities at many levels have established **official channels**, including telephone hotlines, web pages, online platforms, mobile apps, and social media accounts for the public to report corruption.
 - A website designed to receive whistleblower reports regarding the Central Government has received **4,924 whistleblower tips** since its December 2014 launch.
 - CCDI recently opened an account on a popular Chinese social media platform “WeChat.” Through the account, users can lodge corruption complaints against government officials.



Key Lesson

Multinational companies (“MNCs”) operating in China should be aware of increased risk of whistleblowing in China. Companies need to have a process in place to promptly and properly address and investigate internal whistleblower complaints, thereby lowering the risk of external exposure.

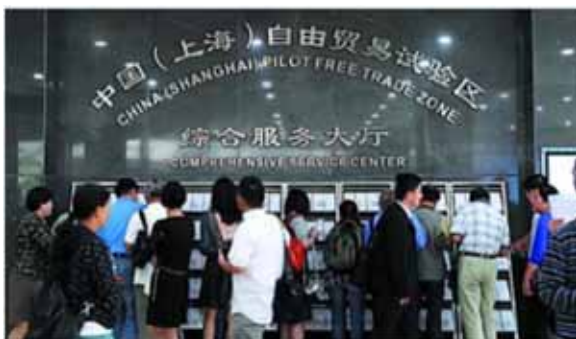
China Enforcement Trend: Continuing Scrutiny of SOEs

Dealing with China's complicated web of state-owned entities is often a practical necessity for companies. Many of these entities have been under investigation for corruption, and MNCs should be alert for scrutiny arising from their local business relationships.

Sector	Recent Enforcement Developments
Financial	<ul style="list-style-type: none">• Top officials at China Securities and Regulatory Commission (“CSRC”), major securities brokerages, including CITIC Securities, and their senior executives under investigation following 2015 market crash.• CCDI has launched an inspection tour of China's financial regulatory agencies, including the China Banking Regulatory Commission, as well as the big four state-owned commercial banks, including Agricultural Bank of China.
Energy	<ul style="list-style-type: none">• Former top executives from Sinopec Group and China Resources under investigation for graft and corruption.• Former executives of PetroChina and Sinopec face prosecution on corruption charges.• President of Sinochem under investigation for graft and corruption.
Telecom	<ul style="list-style-type: none">• Senior executives of China Mobile's Beijing, Tianjin, Shanxi, Hunan, and Fujian branches investigated for corruption.• Two major graft investigations are underway involving China Unicom subsidiary Huasheng Communications.• Chairman and CEO of China Telecom resigned in a corruption probe.
Aviation	<ul style="list-style-type: none">• At least three officials from the Civil Aviation Administration of China and the general manager of Beijing Capital Airport detained for suspicion of corruption.• Several senior executives of China Southern Airlines under investigation.
Automotive	<ul style="list-style-type: none">• The president of Dongfeng Motor Group and the chairman of FAW Group Corp probed for suspected corruption.
Media	<ul style="list-style-type: none">• Party organ People's Daily targeted in a corruption and blackmail investigation.• Top executives of People.cn, the website of People's Daily, detained for alleged corruption.

China Enforcement Trend: Anti-Corruption Push Shifts to Shanghai

Recent cases show that China's anti-graft agencies have zeroed in on fighting corruption in the country's largest city and financial center. Companies seeking to take advantage of Shanghai's wealthier consumer base, educated labor force, and friendly business environment should understand the risks.



- Twenty corporate, institutional and investment enterprises in Shanghai under CCDI inspection, including:
 - Two of China's largest state-owned brokerages, **Guotai Junan Securities** and **Haitong Securities**; and
 - Major SOEs in the energy, aviation and financial sectors: **Shanghai Automotive Industry Corp.**, **Shanghai Media Group**, **China Pacific Insurance**, **Shenergy Co.**, **Shanghai Electric Group Co.**, and **Shanghai International Airport**, etc.
- Vice Mayor Ai Baojun became the first provincial-level official sacked in Shanghai in the anti-corruption campaign.
- **Fosun Group** chairman Guo Guangchang was recently taken away to "assist in certain investigations," and the scope of further investigation remains unclear. Fosun was previously cited in a court proceeding against Wang Zongnan, former chairman of **Bright Food Group**, for the sale of two villas developed by Fosun to Mr. Wang's parents at below-market prices.

China Enforcement Trend: Expanded Avenues for Conducting Due Diligence

Due diligence on third parties—in particular on those who are close relatives or associates of government officials—remains crucial to mitigating corruption risks. Conducting due diligence has been made easier with China’s increasing willingness to grant access to its public records.

Incremental Access to Publicly Available Information

- A new set of enterprise reporting and disclosure data is available on the **Enterprise Credit and Information Public Disclosure System**:
 - Annual report for the preceding year filed with the local Administration of Industry and Commerce (“AIC”) is available to the public during the first half of the year.
 - Information that may reflect the registered enterprise’s good standing, including information regarding administrative sanctions received, is disclosed on a real-time basis, within 20 working days of such information becoming available.
- The Supreme People’s Procuratorate maintains a centralized **Bribery Conviction Database**, linking systems of local procuratorates across the country:
 - Information on the nature of bribery charges, the name of the party (individual or company) offering the bribe, the amount of bribe involved, and the penalties imposed are available through the database.



China Enforcement Trend: Increasing Challenges to Cross-Border Data Production

- China has been strengthening its *state secrets and data privacy laws*, making it more difficult to obtain sensitive information involving state secrets or citizens' personal data.
 - *E.g.*, Ninth Amendment to the PRC Criminal Law expands Article 253-1 criminalizes illegally obtaining or providing *any type* of citizens' personal information.
- Meanwhile, the effect of China's state secrets and data privacy laws are being tested in U.S. litigation, and MNCs may face a dilemma when compelled to produce restricted data from China.
 - In *Gucci America Inc. et al. v. Li et al.*, No. 10-04974 (SDNY), non-party Bank of China resisted subpoenas to produce account records of suspected counterfeiters, citing PRC laws. The Bank was found in contempt and subject to a daily fine of \$50,000 until it complied with the subpoenas.

Sources: *U.S. Judge Holds Bank of China In Contempt For Defying Subpoenas*, WSJ (Nov. 24, 2015); *Bank of China Faces Daily Contempt Fines in U.S.-Court Ruling*, REUTERS (Dec. 1, 2015).

Key Lessons in Conducting Investigations and Diligence in China

When seeking documents and information in China, remember that PRC data privacy and state secret laws and regulations may constrain data production and transfer.

- A host of laws and sector-specific regulations may impact the legality of collecting personal data of potential commercial relevance.
- Individuals who illegally obtain or provide citizens' personal data are subject to criminal penalties under PRC Criminal Law Article 253-1. Those who illegally obtain personal data in the course of fulfilling official duties are subject to increased penalties. Recipients of data may also be held liable.
- Chinese law does not clearly define the meaning and scope of "state secrets." Commercially relevant data may be classified and barred from overseas transmission.
- Companies should seek expert advice regarding data collection, transmission, and production.



Middle East & Africa

MENA Corruption Landscape

Transparency International Corruption Perceptions Index 2015

Iraq: 161

Iran: 130

Turkey: 66

Saudi Arabia: 48

Qatar: 22

United Arab Emirates: 23



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3/10 Three out of the bottom 10 countries in the Transparency Corruption Index are in MENA. But diverse region – see United Arab Emirates, Qatar, Bahrain, Saudi Arabia and Turkey– which are ranked 23rd, 22nd, 50th, 48th and 66th, respectively.

49% Percentage of MENA surveyed who believe offering gifts or cash payments to win business is justifiable to help business survive.

35% Percentage of MENA surveyed who believe bribery/corruption are widespread practices.

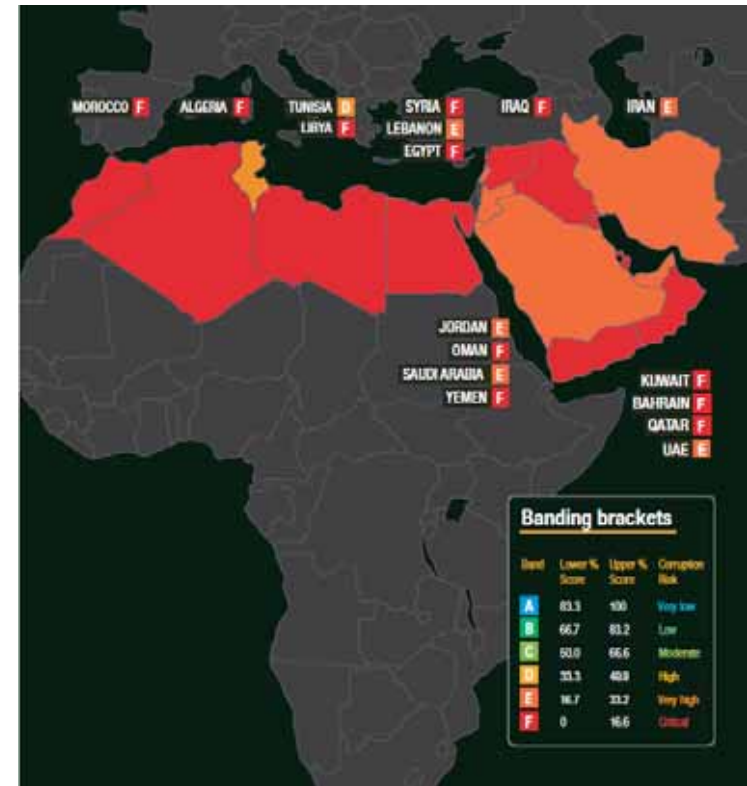
Stability, security and economic growth (in the face of economic slow-downs) have taken precedence over, and have actually undermined, anti-bribery and corruption efforts.

Iran: semi-governmental organizations (e.g., Islamic Revolutionary Guards Corp) and sanctioned groups are deeply embedded economic players (often held by holding companies and affiliates), a major concern for companies entering into the market.

According to a recent survey of corporate management in MENA, only **52%** of respondents stated that they had an anti-bribery or anti-corruption policy and code of conduct in place.

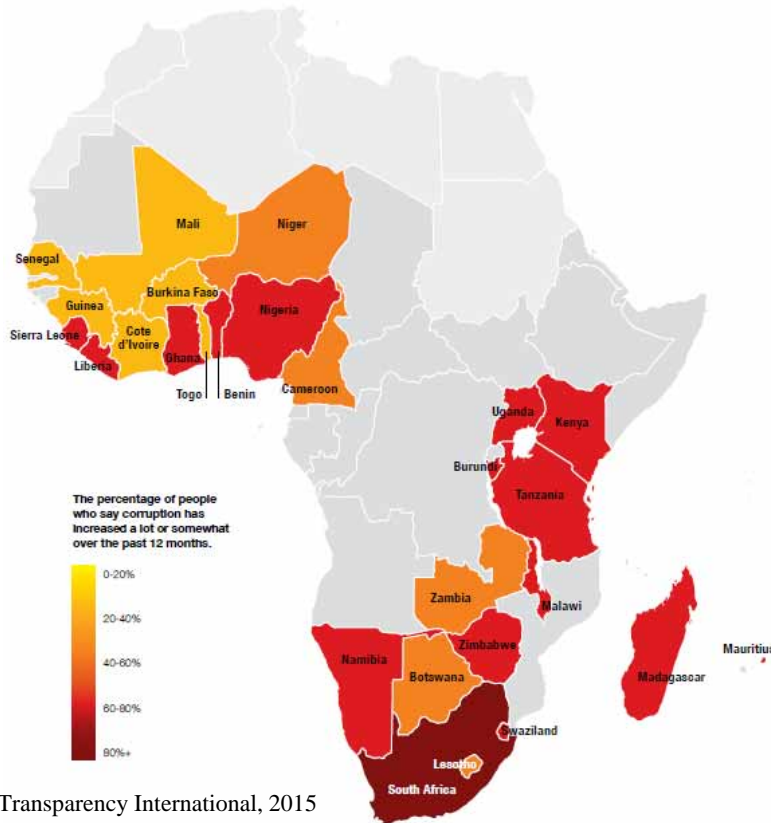
MENA Corruption Landscape: Increased Security, Increased Corruption

- Increased defense spending across the region, coupled with a lack of accountability and oversight, has fueled increased corruption.
- Corruption further enables conflict and feeds illegal arms proliferation, especially with poor export control systems and the infiltration of organized crime into procurement.
- Examples of high-risk practices:
 - Egypt’s entire defense budget (\$4.4 billion) is classified as a state secret, and no details on the spending are available.
 - Bahrain has completed a number of large arms purchases recently, but the process is very opaque. The procurement steps are exempted from public tender and undefined. This is also the case in the UAE.
 - In Saudi Arabia, defense spending has increased and now makes up 30% of public spending. However, the Ministry of Defense does not exercise procurement control; often, large strategic purchases can be undertaken by a single, high-ranking member of the royal family.



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Africa Corruption Landscape



According to Transparency International, 58% of people in Africa think corruption has increased in recent years. Countries with the highest percentage of people with this belief were: (1) South Africa, at 83%, (2) Ghana, at 76%, and (3) Nigeria, at 75%.

\$60 billion Estimate by the UN Economic Commission for Africa of the annual outflow of illicit finance through trade mispricing alone.

72-90% Percentage of those surveyed in Nigeria (72%), South Africa (78%), and Kenya (90%) stating that bribery and corruption are widespread. Police and the private sector are perceived as most corrupt. Of public institutions, courts were also perceived as very corrupt.

Country	CPI Rank	Country	CPI Rank	Country	CPI Rank
Botswana	28	Rwanda	44	Benin	83
Cape Verde	40	Ghana	56	Burkina Faso	76
Seychelles	40	South Africa	61	Zambia	76
Mauritius	45	Senegal	61	Gabon	99
Lesotho	61	Sudan	165	Liberia	83
Namibia	55	Sao Tome and Principe	66	Somalia	167

Middle East: Anti-Corruption Trends



Oman: Since the Arab Spring, Oman has strengthened its domestic anti-corruption laws by boosting the powers of the state to investigate suspicious cases, and has sentenced nearly 30 people (including public officials and private sector executives) for graft and corruption.

Tunisia: Tunisia is slowly unwinding the corrupt legacy of its deposed leader – who in 2010 reportedly had, along with his privileged insiders, captured 21% of all private sectors of the economy.



While several countries, such as Oman and Jordan, have taken positive steps, the region generally lags behind in terms of reform and legislation that focuses on integrity, transparency, and accountability. For example, only three countries have access to information laws (Yemen, Tunisia and Jordan), and whistleblower protection is nearly nonexistent.

Africa: Anti-Corruption Trends

Africa lags behind in terms of institutional capacity and political will to fight corruption. However, there is an increasing willingness on the part of states to prosecute both current and former public officials for fraud and corruption and to trace assets domestically and internationally.

Nigeria

Though many challenges remain, Nigeria's President Buhari was elected in 2015 on a platform to clean up politics. Recently, Nigeria's former national security advisor, Sambo Dasuki, was arrested for allegedly stealing over \$2 billion by awarding phantom contracts to buy military equipment (including helicopters and fighter jets) in connection with the fight against Boko Haram militants. Given the entrenched institutional and political corruption, progress will likely be ad hoc.

South Africa

Lack of enforcement has been a paramount issue for South Africa, which is a signatory to the OECD convention and has recently strengthened its Anti-Corruption Task Team. The perception remains, however, that the government lacks commitment to investigate and prosecute cross-border corruption. South Africa has not prosecuted any major foreign bribery cases in the last four years.

2015 FCPA Enforcement Actions Relating to the Middle East and Africa



PBSJ Corporation (now known as The Atkins North America Holdings Corporation): Florida engineering and construction firm allegedly offered and authorized bribes and employment prospects to a Qatari foreign official to win government contracts in Qatar and Morocco. The investigation found that the firm offered and authorized approximately \$1.4 million in payments and benefits (designed as “agency fees”) in return for confidential information relating to bids it submitted.

- SEC settlement: \$3.4 million in disgorgement, interest, and penalties and a DPA based on the company’s self-reporting and cooperation.
- Notably, this is only the third DPA entered into by the SEC.



Hitachi, Ltd.: Allegations that the Japan-based company sold a 25% stake in its local South African subsidiary to Chancellor, a company that functioned as an alter ego of the ANC. This arrangement allegedly allowed Chancellor to share in profits from contracts won by Hitachi to build power plants worth \$5.6 billion.

- SEC settlement: \$19 million in penalties. No bribery charges were brought likely because the conduct occurred outside of the U.S.
- This case serves as a noteworthy reminder for robust risk-based compliance programs, especially around new business partners.

2015 FCPA Enforcement Actions Relating to the Middle East and Africa



BNY MELLON

BNY Mellon: Allegedly provided internships to relatives of foreign officials overseeing an unnamed Middle Eastern sovereign wealth fund, which had over \$55 billion in assets under bank management.

- SEC charged the bank with violations of the anti-bribery and internal controls provisions, pursuant to which BNY Mellon paid \$14.3 million in disgorgement, interest and penalties.
- This is the first case involving internships as the thing of value
- The SEC's theory was that the "*requesting officials derived significant personal value in being able to confer this benefit on their family members.*"



Goodyear Tire & Rubber Co.: Allegedly paid bribes in connection with tire sales in Kenya and Angola. The payments were in cash to employees of private companies or government-owned entities and local authorities.

- Goodyear paid \$16 million to settle the SEC's charges, which were based on a "*failure to prevent or detect*" risks, but did not include anti-bribery charges.
- No penalty was levied due to the company's self-reporting, remediation, and cooperation.

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2015 FCPA Enforcement Actions Relating to the Middle East and Africa



FLIR: The SEC charged Oregon-based FLIR with violating the anti-bribery, books and records, and internal controls provisions by allegedly financing a “*world tour*” of personal travel for Saudi Arabian and Egyptian officials in order to influence sales of its infrared technology products. FLIR allegedly made over \$7 million in profits from tainted transactions.

- FLIR self-reported the conduct and cooperated with the investigation. It agreed to pay approximately \$9.5 million in disgorgement, prejudgment interest, and penalties.
- Like the other cases discussed, there were also no DOJ charges.
- Gifts, travel, and entertainment remain an important enforcement theme.

Key Lessons from the *FLIR* Settlement

- More often than not, enforcement involves multiple countries. Ensure consistency in compliance programs (and enforcement) and messaging across the region.
- FLIR illustrates how governments tend to be very large players—both as regulators and customers—in the marketplace. This is especially true in the security industry.
- DOJ perhaps more frequently declining to prosecute companies for FCPA violations.

Middle East Enforcement Trend: Improvement in Legal Frameworks and Enforcement

In Middle Eastern countries where Western businesses are more likely to invest (e.g., the GCC countries, Turkey, Israel), there are clear signs of improvement in transparency and anti-corruption enforcement. However, macro-headwinds may slow down or reverse progress.

Main Challenges:

- Historically, *GCC governments* have been major players in the economy rather than arm's-length regulators.
- Retention of *local agents* or sponsors may be a prerequisite for doing business in certain markets.
- Public sector funds and the *ruling family's wealth* are sometimes indistinguishable.
- A focus on security concerns and business imperatives, along with a challenging business environment, make corruption more attractive and put enforcement in the backseat.



Key Takeaways:

- Political corruption, lack of transparency and a declining security situation that perpetuates corruption are all major challenges, though certain major markets in the region have seen a slow cultural shift towards “arm's-length” business transactions.
- Local relationship-driven business culture increases the risk of FCPA and U.K. Bribery Act violations.
- Companies are advised to exercise caution and carry out due diligence before entering JVs or retaining agents or distributors.

Trend: Iran Sanctions Relief

The Iran sanctions regime is the most comprehensive U.S. sanctions regime, and includes hundreds of black-listed organizations and individuals, targeting both the jurisdiction and specific industrial sectors.

E.U. Sanctions Relief

- Sanctions relief (since Implementation Day on 16 January 2016) has allowed EU firms to reenter Iran.

U.S. Sanctions Relief

- For non-U.S. persons: broadly speaking (a) sanctions have been lifted (b) sanctioned individuals have been removed from sanctions list, and (c) entities no longer face the choice between Iranian and U.S. markets.
- For U.S. persons, relief includes:
 - export of civil aviation goods,
 - imports of food stuffs and certain goods,
 - foreign subsidiaries of U.S. companies resuming work in Iran, and
 - an easing of granting licenses (will vary depending on the political atmosphere).



Trend: Iran Sanctions Relief (cont'd)

Main challenges and takeaways:

- Many significant entities remain sanctioned (e.g., the Islamic Revolutionary Guard Corps). Enhanced due diligence will therefore remain essential;
- Ongoing legal and reputational risk;
- Possible for there to be a “*snap back*” of sanctions (e.g., post election);
- Western banks have not (yet) entered the Iranian market (de-risking approach);
- Non-U.S. firms can again engage with many of Iran’s largest banks, corporations, and organizations without risking their U.S. market access;
- Culture of compliance from top down is key;
- Enhanced and continual due diligence with robust internal controls and accurate risk analysis is vital, as is paying attention to partly owned entities, enhanced reps, and warranties.



A brief illustration of the continuing challenges:

While there is now relief for the civil aviation sector, companies will still have to contend with sanctioned individuals and entities—for example, Mahan Airlines, which has been involved in transporting Iranian troops and military equipment to Syria and Yemen, will remain conflicted.

Africa Enforcement Trend

Arab Spring and various sub-Saharan African countries have been taking serious steps to fight corruption and to trace assets of former and current officials.

- Poverty, political instability, and slow economic development are the main challenges facing the African continent.
- Corruption remains a major problem.
- Several nations have taken proactive measures to fight corruption:
 - Nigeria and Tunisia have been pursuing the assets of former regime members worldwide with some degree of success.
 - Djibouti, Senegal, and Malawi have taken enforcement action against high-profile individuals charged with corruption-related offenses
- Tackling corruption will continue to be prominently featured on the political agenda as long as it remains a key objective of foreign aid donors. For example, foreign aid may comprise up to 40% of Malawi's budget. After the cabinet's sacking in Malawi, the EU threatened to withhold a scheduled aid payment of 29 million Euros until the government could prove it was taking steps to confront endemic corruption.



Key Takeaways

Although some changes have been made in Africa, broadly speaking there has been a lack of significant institutional progress in both government and private sectors. Companies looking to do business and invest in Africa are advised to ensure that their anti-corruption policies and procedures are up-to-date. Companies are also advised to do extensive due diligence prior to committing funds to ensure compliance with the local regulatory regime and global expectations.

Middle East: Anti-Corruption/Anti-Bribery Laws and Enforcement Agencies

Enforcement initiatives listed here generally lack sustained commitment, and in the current environment, actual enforcement has taken a back seat to the following priorities:

- **Security Concerns:** A lack of internal and external security, armed conflicts and violence have perpetuated corrupt practices since governments have both prioritized security (using purchases as a political tool). For example, Iraq recently revealed it had 50,000 ghost soldiers on its payroll.
- **Political Corruption:** The government, ruling families and elites are driving much of the economy and have built an entire system of patronage around it; little reform has taken place here.

Morocco: In 2011 Morocco passed certain whistleblower protection laws, and in 2012 the government launched a campaign aimed at raising anti-corruption awareness among the public.

Jordan: In 2012, the King charted the Jordanian Royal Committee for Enhancing the National Integrity System. Jordan is now establishing an Integrity, Ombudsman and Anti-Corruption Commission.

Saudi Arabia: Results revealed that the National Anti-Corruption Commission (established in 2011 in order to combat corruption) has been ignored by government departments. The effectiveness of the recently established Nazaha (anti-corruption commission) remains to be seen.

Kuwait: In December 2015 the Constitutional Court annulled the decree that established Kuwait's Anti-Corruption Commission. A new bill has now been brought forward to establish a General Authority for Combatting Corruption.

Qatar: Qatar made its ambitions clear, stating that it wanted to appear in the top ten least corrupt nations and creating an anti-corruption watchdog, the Administrative Control and Transparency Authority.

Africa: Anti-Corruption/Anti-Bribery Laws and Enforcement Agencies

Nigeria: In 2015, with the support of international governmental organizations, amended the national extradition law. The previous law suffered from legal ambiguities, causing delays and difficulties in the extradition process.

Ethiopia: CoST Ethiopia was established in 2012, after three years as a pilot country with the Construction Sector Transparency Initiative, which aims at enhancing transparency and accountability in the construction sector, focusing on public disclosure of information.

South Africa: In 2010, South Africa implemented an Anti-Corruption Task Team, which investigates irregular procurement activities of public entities—but has been riddled with accusations that it has been ineffective.

Effective enforcement and implementation remains the biggest issue.

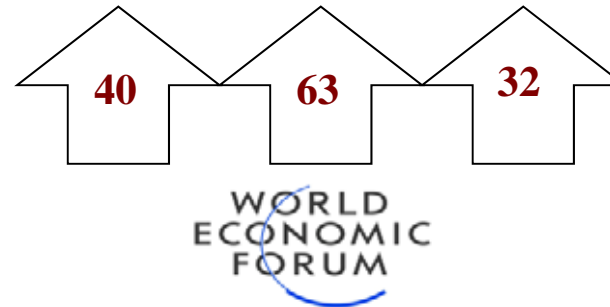


India: Are Anti-Corruption Efforts Working?

According to prominent metrics, India's corruption situation has improved:



The country saw a modest jump in the latest CPI results, claiming the 76th spot (up from 85th). India now ranks ahead of economic rival China.



According to the World Economic Forum's annual Global Competitiveness Report, India improved its ranking (out of 140 countries) in the areas of Irregular Diversion of Public Funds (40th, up from 60th), Irregular Payments (63rd, up from 93rd), and Favoritism in Decisions of Government Officials (32nd, up from 49th).

However, corruption and bribery continue to present significant risks for businesses:

52%

According to one recent survey, 52% of Indian respondents agree that offering gifts to win business is justifiable to help a business survive.

70%

72%

Another survey reported that 70% of Indian respondents feel that bribery and corruption are widespread, and 72% believe that the management of their companies is likely to cut corners to meet targets.

Prime Minister Modi Continues Anti-Corruption Drive Despite Significant Challenges

Prime Minister Narendra Modi was swept into office in 2014 on promises to rid the country of endemic corruption. Nearly two years into his term, substantial issues remain despite significant progress.

Modi's Signature 2015 Anti-Corruption Efforts

- A purge of 45 senior government officials, who were removed or faced pension cuts for “unsatisfactory performance and delivery in public service.” PM Modi cited corruption as the driver behind the actions.
- Enactment of the “Black Money Undisclosed Foreign Income and Assets and Imposition of Tax Act,” which provides hefty fines and potential imprisonment for those who stash income overseas in an attempt to evade taxes. PM Modi often cites corruption proceeds as a prime target of the legislation.
- Information-sharing agreements with U.S. and numerous other countries designed to track the flow of illicit funds.

Challenges Going Forward

- Staunch resistance from rival political parties, such as Congress and the AAP, causing deadlock in Parliament.
- Allegations of corruption leveled by some at Modi's own administration.
- Stubbornly high levels of public corruption among low-level officials.

Sources: *Govt Unsparing in Punishing the Corrupt: Modi*, THE INDIAN EXPRESS (Nov. 18, 2015); *India's Narendra Modi Puts Spotlight on Efforts to Drive Out “Termite-Like” Graft*, WALL STREET JOURNAL, Aug. 15, 2015).

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“Corruption is like a termite, it spreads slowly, reaches everywhere but it can be beaten with timely injections.”

-PM Modi, Aug. 15, 2015

Pending Changes to the PCA Will Have Profound Effects on Companies

Prevention of Corruption Act (“PCA”), 1988

India’s key anti-corruption law generally prohibits Indian public servants from accepting “*any gratification*” for doing or forbearing an official act, and prohibits Indian public servants from accepting “*any valuable thing*” without consideration or inadequate consideration. The law also prohibits *abetting any person* to violate the PCA.

Prevention of Corruption (Amendment) Bill, 2013

Parliament has introduced a bill that would substantially alter the PCA. Many of the Bill’s key amendments, which were inspired by the U.K. Bribery Act, will have a direct effect on how companies do business in India. Key components include:

- *Mandated fines* for businesses engaging in bribery.
- Creates a *specific offense for giving or offering a bribe*, whereas the PCA only created liability for aiding and abetting.
- Where a commercial organization is guilty of an offense, *every person who, at the time of the offense, “was in charge of” the conduct of the business shall be deemed guilty* unless that person proves he or she did not know, or should not have known, about the conduct at issue.
- *Potential liability of parent companies* for acts committed by subsidiaries.

The Bill was tabled in the upper house of the Indian Parliament in December 2015. It is expected to be enacted into law in 2016 after approval by both houses.

Spotlight on Compliance Programs

The proposed amendments will provide a defense if a company can demonstrate that it had in place *adequate procedures to prevent the giving of bribes* by persons associated with it. *Therefore, establishing robust internal controls will be critical.*

Indian Anti-Corruption Laws: *The Companies Act*

India's updated *Companies Act*, which came into effect on April 1, 2014, places additional obligations on companies and their management.

Key Provisions

- § 128(1) Requires that every balance sheet or profit and loss statement present “*a true and fair view*” of the company’s affairs.
- § 134(5) Requires directors of listed companies to *certify annually* that their company has implemented internal financial controls and “*proper systems to ensure compliance* with the provisions of all applicable laws and that such systems were adequate and operating effectively.”
- §§ 134(8), 447 *Significant penalties for fraud and noncompliance*, which include fines and prison for “officers of the company.”
- § 177(9)-(10) Directs listed companies to establish a “*vigil mechanism*” for directors and employees to report “*genuine concerns*.” The Act also protects against “*victimization*” of whistleblowers.
- § 245 Allows, for the first time, *class action lawsuits* against a company.

Understand Your Disclosure Obligations

The disclosure clauses of the *Companies Act* have caused considerable confusion. Understanding your disclosure obligations is critical.

WHO Must Disclose?

- Neither the *Companies Act* nor the *Prevention of Corruption Act* places a specific obligation on companies to report confirmed violations to the government.
- However, the *Companies Act* does impose an obligation on *statutory auditors* to report to the government instances of *fraud* committed by the employees and officers of a company “within such time and in such manner as may be prescribed.”

WHAT Must be Disclosed?

- The *Companies Act* defines “fraud” to include “any act, omission, concealment of any fact or abuse of position “ committed by any person “with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders . . .”
- Recent guidance published by the Institute of Chartered Accountants in India urges auditors to consider reporting instances of bribery and corruption to the government under this clause.
- In December 2015, Parliament notified an amendment to the disclosure provisions of the Act. Broadly speaking, for frauds above INR 10M (~\$150,000), auditors must report the alleged fraud to the company, which is given 45 days to respond before the report (and response) are forwarded to the government. For frauds below INR 10M, the auditors are required to notify the company’s board of directors. The board is then required to disclose details of the fraud, and the remedial action taken by the company in relation to fraud, in its annual report, which is filed with the Registrar of Companies.

Ever-Increasing Enforcement Agencies Create Uncertainty for Businesses

An array of Central- and State-level enforcement agencies increase the risk of dual enforcement. Understanding the agencies under which your organization is regulated is key.



Indian Anti-Corruption Laws: Lokpal Update

India's historic anti-corruption movement led to the passage of the *Lokpal and Lokayuktas Act (2012)*. Among other things, the law aims to:

- Create an independent body (the “Lokpal”) with broad powers to *investigate corruption complaints against the highest political authorities*, including the Prime Minister;
 - Enhance maximum punishment for corruption from *7 years to 10 years imprisonment*;
 - Mandate that every state create a *local anti-corruption investigation agency* (“Lokayuktas”); and
 - Allow the Lokpal to investigate any person (which includes legal entities) involved in *aiding violations of the PCA, bribe giving or taking, or conspiracy* related to any violation of the PCA.
- ★ Implementation of the law remains ongoing as lawmakers contemplate changes to the law’s processes for selecting members of the Lokpal.

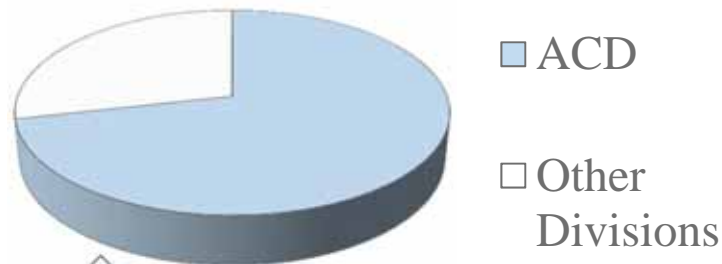
Other Proposed Laws and Initiatives

- Law punishing Indian individuals who bribe foreign government officials.
- Revisions to the Penal Code that would prohibit commercial bribery.
- Stricter guidelines and transparency in public procurement.
- Sector integrity pacts obligating parties to government contracts to conduct business ethically.
- Enhanced whistleblower protection laws.

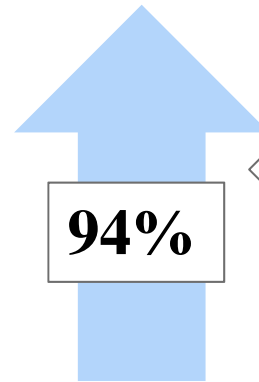
India Local Enforcement: By the Numbers

The latest statistics show that law enforcement officials at the state and local level are focused on the country's anti-corruption laws.

CBI Cases Registered (2014)



The *Anti-Corruption Division* handled around **70%** of all cases registered by the CBI in 2014.



The CBI filed FIRs in 101 graft-related cases in 2015, a 94% increase over the previous year. In total, the CBI claims to have identified 2,200 corrupt senior government officials in 2015.

Spotlight on Mumbai

Arrests of Public Officers by the Maharashtra Anti-Corruption Bureau

Year	Tax Officials	Police Officers	Municipal Corp.
2013	148	237	56
2014	328	412	95
2015	391	366	89

Recent Examples of FCPA Enforcement Actions Relating to India

Oracle (2012): involving the creation of slush funds by the company's Indian subsidiary. The off-book funds were used to make payments to phony service vendors in violation of the FCPA's accounting provisions. Oracle paid a \$2 million civil penalty to settle the charges.

Tyco (2012): involving the company's German subsidiary using sales agents in India to make payments to Indian government officials in order to secure sales of its industrial valves. The improper payments were recorded as agent "commissions" in the company's books and records. Tyco paid approximately \$26.8 million to settle charges with the DOJ and the SEC.

Dmitry Firtash, et. al (2014): involving the alleged payment of \$18.5 million in bribes to state and central government officials in India to secure license approvals for a titanium mine project. According to the DOJ, six foreign nationals used U.S. banks to transmit funds used to bribe Indian officials. The individuals have been indicted on charges of participating in an alleged international racketeering conspiracy and with conspiracy to violate the FCPA. The case remains ongoing.

Louis Berger (2015): involving a scheme to pay bribes to foreign officials in Indonesia, Vietnam, India, and Kuwait in order to secure contracts with government agencies. Louis Berger entered into a deferred prosecution agreement and agreed to pay a criminal fine of \$17.1 million for violations of the FCPA's anti-bribery provisions.

India Corruption Trends: Lessons Learned from *Finmeccanica* (2010-2016)

Facts: In February 2010, the Indian Air Force signed a deal with AugustaWestland, a subsidiary of Italian defense contractor Finmeccanica SpA., for the purchase of 12 military helicopters. After reports surfaced of possible bribes and kickbacks in the bidding process, Italian police arrested the CEO of Finmeccanica, while India's Ministry of Defense froze payments to the company. The Indian CBI opened an independent investigation in 2013. The Italian court ultimately acquitted the CEO of the bribery charge, but sentenced him to two years imprisonment for "false bookkeeping." The CBI investigation remains ongoing, with the Bureau set to take statements in 2016. The case is illustrative of several trends in Indian anti-corruption enforcement efforts, namely:

- **Cross-Border Cooperation:** Indian officials were permitted to attend the Italian proceedings, and information sharing between the two countries was instrumental in both investigations.
- **Concurrent Investigations:** As *Finmeccanica* shows, Indian authorities will not shy away from conducting independent investigations into bribery allegations, even where investigations in other jurisdictions have ended.
- **Third-Party Risks:** The investigations focused on the role of third-party middlemen in arranging the alleged bribes. Following the close of the Italian case, Indian officials arrested a New Delhi-based attorney on allegations that he helped establish bank accounts and middlemen for the purpose of facilitating the payments.
- **Individual Prosecution:** Enforcement of anti-bribery laws are increasingly focused on those providing the payments, including corporations and individuals. As recently as January 2016, Interpol issued an arrest warrant, at CBI's request, for one of the middlemen involved.
- **Integrity Pacts:** Indian government agencies and PSUs are increasingly requiring contractors to sign agreements obligating them to conduct business ethically. In the wake of the allegations, the Indian Ministry of Defense blacklisted Finmeccanica and AugustaWestland for breach of an integrity pact.



India Corruption Trends: Procurement Pitfalls

- ❖ The most recent FCPA cases involving India—*Louis Berger* and *Dmitry Firtash*—involved alleged payments to government officials to secure government contracts.
- ❖ In a recent survey conducted by the United Nations Office on Drugs and Crime, **over 60%** of private sector respondents identified project selection or bid evaluation as the stages most vulnerable to corruption during the life of a project.
- ❖ India-specific procurement risks include widespread use of **tendering agents**, mandatory interaction with **state-owned bid clearinghouses**, varied and inconsistently applied **tendering rules**, and **lack of transparency** in bid processes.
- ❖ The Indian government is ramping up efforts to tackle corruption in public procurement. Most significantly, **e-procurement systems** that reduce human interaction are becoming more common. Still, public procurement remains a high-risk endeavor in India's more rural states.

Procurement Best Practices

- Always use e-procurement, when available.
- Tendering agents should be engaged only after thorough background checks and due diligence. Check local laws and tendering guidelines to ensure use of third parties is not prohibited.
- Ensure submissions meet all technical requirements of the tender. Small errors are fertile ground for bribe requests. Submit comfortably within deadlines.
- Be especially careful when bidding on urgent purchases or when dealing with a state-owned bid clearinghouse.
- Track actual bids submitted by agents and other third parties and closely monitor pricing.

Indian Anti-Corruption Laws and Guidelines

Prevention of Corruption Act, 1988

- § 7 Prohibits Indian public servants from accepting “any gratification” for doing or forbearing an official act.
- § 11 Prohibits Indian public servants from accepting “any valuable thing” without consideration or inadequate consideration.
- §§ 8-9 Prohibits any person from receiving “gratification” for illegally influencing an Indian public servant to do or forbear an official act.
- §§ 10 & 12 Prohibits abetting any person to violate the PCA.
- § 19 Government permission required to prosecute a public servant. (Defense personnel cannot be tried by ordinary criminal court).

No Exception for Facilitating Payments. Speed money (for routine, legal actions) constitutes bribe. (Som Prakash v. State of Delhi AIR 1974 SC 989)

All India Services (Conduct) Rules, 1968

- Rules govern the conduct of most members of the Indian Civil Services, including the Indian Administrative Service, the Indian Police Service and the Indian Forest Service. Instructive for companies.
- Prohibits government employees and public servants from accepting “gifts” exceeding INR 1,000 (~\$20) value.
- Defines “gifts” to include hospitality, transportation, and other business courtesies.
- Exempts gifts from personal friends and relatives with no official business with the official on occasions where religious and social practice demands such gifts.
- Contains an exemption for “casual meals,” “casual lifts,” or “other social hospitality,” although the government has not provided any further guidance on the meaning of these terms.
- Public servants must report any gift whose value exceeds 5,000 rupees (~\$90), and may not accept “lavish” or “frequent” hospitality from “industrial or commercial firms or other organisations.”

Other Asia Developments: Economic Powerhouses Work to Slow Rising Graft.



Japanese companies are among the largest offenders of the FCPA. Five Japanese-headquartered companies—JGC, Marubeni, Bridgestone, Hitachi and Olympus—have been recently subject to FCPA enforcement actions, carrying sizeable fines and penalties. On March 2, 2016, Olympus agreed to pay USD 22 million to settle FCPA charges stemming from alleged kickbacks paid to healthcare professionals in Latin America and an additional USD 623 million to resolve charges filed under the federal Anti-kickback Statute.

GIBSON DUNN



Hong Kong, traditionally viewed as a safe place to do business corruption-free, has found itself in unfamiliar territory as allegations of corrupt dealings surface. Recent cases have involved wealthy real estate developers making payments to high-ranking Hong Kong officials, the second highest-ranking executive in the government receiving a 7.5-year jail sentence for corruption, and an investigation by Hong Kong's anti-graft body, the Independent Commission Against Corruption, into its own former Commissioner following allegations of lavish entertainment and gifts provided to PRC officials.



South Korea continues its battle against deep-rooted corruption. In November 2015, Korean authorities indicted the former chairman of steelmaker POSCO, along with 30 other employees, in connection with a long-running corruption investigation. 2015 also saw several members of Parliament lose their seats following bribery convictions, as well as revelations of widespread corruption in the defense sector. Meanwhile, Korea's new anti-corruption law is set to go into effect in October 2016, bringing with it increased penalties for corrupt public officials as well as corporate liability for the payment of bribes.

Other Asia Developments: Corruption Continues to Prevent Tiger Economies from Reaching Full Potential.



Corruption in the *Philippines* has taken center stage in this year's race to replace President Benigno Aquino III, with candidates simultaneously promising to rid the country of graft while dodging corruption allegations from their rivals. Meanwhile a recent survey shows that over half of the working population feels pressure to bribe public and private sector clients hinders growth.

Corruption continues to make headlines in *Indonesia*. In December 2015, House Speaker Setya Novano resigned amidst allegations of extortion attempts against a U.S. mining company. In addition, the KPK, Indonesia's beleaguered anti-corruption agency, has new life after its new chief vowed to confront police and others that have historically hindered the agency's work.



Long considered Southeast Asia's success story, *Thailand's* shifting political regimes provide fertile ground for public corruption. A lack of enforcement has led to an increase in bribe requests, and citizens have become so incensed that leaders have plans to include anti-corruption provisions in the country's new constitution.



GIBSON DUNN

As *Myanmar* continues to open its largely untapped consumer base to foreign companies, long-running corruption issues threaten to derail the country's remarkable comeback. In March 2016, two senior government officials were fired during the course of a broader government investigation into the country's profitable jade mining industry.



Sources: American Chamber of Commerce and the U.S. Chamber of Commerce, *ASEAN Business Outlook Survey* (2016).



Global Trends and Risk Mitigation Strategies

GIBSON DUNN

Trend: Focus on Compliance Programs in Enforcement Actions and New Laws

Enforcement authorities and lawmakers across the globe increasingly require companies to implement effective compliance programs and internal controls.

Examples of Increased Scrutiny by Enforcement Authorities:

Louis Berger: Under the deferred prosecution agreement with the DOJ, Louis Berger has agreed to implement new internal controls to prevent the reoccurrence of bribery. Louis Berger stated that, since 2010, it invested more than \$25 million in new internal controls, new policies & procedures, and comprehensive systems investments.

Bristol-Myers Squibb: The SEC alleged that BMS lacked effective internal controls sufficient to provide reasonable assurances that funds advanced and reimbursed to employees were used for appropriate and authorized purposes. However, the SEC also acknowledged BMS took significant measures to improve its compliance program (e.g., a 100% pre-reimbursement review of all expense claims).

Examples of Increased Scrutiny by Lawmakers:

India: The *Companies Act* and the proposed PCA amendments both require companies to implement robust internal controls designed to detect improper conduct.

Russia: The Russian Federal Anti-Corruption Law No. 273 requires domestic and foreign companies operating in Russia to implement extensive compliance programs; it also describes areas where companies should focus on (e.g., due diligence and corruption risk assessments of business partners).

Brazil: The country's new *Clean Company Law* gives credit to companies that self-report violations and have strong compliance programs.

Mitigation: Establishing an Effective Compliance Program

The greatest bulwark against corruption risk is an effective compliance program. Such programs are increasingly necessary in an age where U.S. and local enforcement agencies are increasingly scrutinizing internal controls when making enforcement decisions.

“Basic elements” the DOJ and SEC consider when evaluating compliance programs:

- Tailored to Risks Faced by the Company
- Clear Compliance Policies
- Targeted Compliance Training
- Culture of Compliance – Tone and Messaging
- Third-Party Due Diligence
- Confidential Reporting of Misconduct
- Evolves with the Business and Market Risks
- Stern Consequences for Violations
- Sufficient Compliance Resources
- Independence of Compliance Function
- Financial Controls and Monitoring

Bristol-Myers Squibb: \$14 Million Settlement with SEC

The SEC found that “*BMS lacked effective internal controls sufficient to provide reasonable assurances that funds advanced and reimbursed to employees [...] were used for appropriate and authorized purposes.*”
-SEC’s Cease-And-Desist-Order against BMS (Oct. 5, 2015).

Morgan Stanley: No Fines or Penalties

After considering all the available facts and circumstances, *including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials*, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson’s conduct. -DOJ Press Release (Apr. 25, 2012).

Trend: Regulators Ramp Up Individual Enforcement

“There is definitely a trend in prosecuting individuals, and I expect that to continue.” - Leslie Caldwell, Assistant Attorney, DOJ Criminal Division

Dmitrij Harder (Chestnut Group)

- The DOJ alleged that Dmitrij Harder, former owner and president of the Chestnut Group, made “consulting” payments totaling more than \$3.5 million to the sister of an official of the European Bank for Reconstruction and Development in order to obtain approvals for loan and equity investment applications totaling more than \$300 million.

Walid Hatoum (PBSJ)

- The SEC alleged that Walid Hatoum, former president of PBSJ’s international subsidiary, agreed to pay \$1.4 million in bribes to a Qatari official’s side company in exchange for confidential bid information.

Vadim Mikerin

- Vadim Mikerin, former director of TENEX and former president of TENAM, was sentenced to 48 months in prison for conspiracy to commit money laundering in connection with his role in arranging more than \$2 million in corrupt payments to influence the awarding of contracts with Russia’s State Atomic Energy Corporation (“ROSATOM”).



Mitigation: Understand the Strategy Behind Enforcement Against Individuals

The Yates Memorandum (Sept. 9, 2015)

A recent memorandum titled “Individual Accountability for Corporate Wrongdoing” issued by Deputy Attorney General Sally Yates outlines the DOJ’s strategy in criminal actions against individuals in a corporate setting.

The memo outlines six principles that should guide prosecutors:

- 1) To be eligible for any cooperation credit, corporations must provide all relevant facts about the individuals involved in corporate misconduct.
- 2) Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
- 3) Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
- 4) In general, corporate resolutions will not provide protection from liability for any individuals.
- 5) Corporate cases should not be concluded without a clear plan to resolve related individual cases before the statute of limitations expires.
- 6) Civil attorneys should focus on individuals based on considerations beyond that individual’s ability to pay.

“Corporations can only commit crimes through flesh-and-blood-people. It’s only fair that the people who are responsible for committing those crimes be held accountable.”

- Sally Q. Yates, Deputy Attorney General

Trend: Increasing Cross-Border Cooperation and Multinational Involvement

As countries increasingly share information, companies must be aware of the risks of concurrent investigations in the U.S. and local markets.

- Louis Berger International, Inc.



- FIFA



- Standard Bank Plc



- China's "Skynet"



Mitigation: Take Practical Steps to Account for Multinational Enforcement

- Hire or designate compliance employees in local markets.
- Tailor compliance policies and investigation protocols to local realities and regulations.
- Remember local data privacy and state secrets laws.
- Never assume compliance issues are limited to a single market.
- Ensure local operations are prepared for local government inspections, audits and raids. Conduct “dawn raid” training and have local guidelines in place.
- Be sure your legal teams are up-to-speed on local laws regarding disclosure of compliance issues to local regulators or statutory auditors.
 - Relevant personnel should have a keen sense of the risks and potential benefits of disclosure.



Trend: Dodd-Frank Act Compounds FCPA Risks

Increasing whistleblower activity will likely lead to more FCPA-related investigations and heftier fines.

Legislation:

According to the whistleblower provisions of the Dodd-Frank Act (15 U.S.C. § 78u-6), the SEC will make a financial award (pay a bounty) to *whistleblowers* who (1) *voluntarily* (2) provide *original information* (3) to the Commission (4) that *leads to* (5) a “*successful enforcement [action].*” The provisions also provide *protections from retaliation* against whistleblowers, although courts have declared that the anti-retaliation provisions do not apply to foreign whistleblowers in some situations.

Statistics:

- Of the 3,923 tips received by the SEC Office of the Whistleblower in FY 2015, **186** pertained to *FCPA allegations* (up from 159 in FY 2014).
- In 2015, the government paid \$37 million in awards to eight individual whistleblowers.
- Where disclosed, most awards have ranged from 20 to 30% of the amount recovered by the Commission.
- **A 30% increase** in number of whistleblower tips since FY2012.
- To date, six of 22 awards to date have been to *foreign-based reporters*.

Dodd-Frank Goes Global

In FY2015, the SEC Office of the Whistleblower received tips from 61 non-U.S. countries:

- U.K.: 72 complaints
- Canada: 49 complaints
- China: 43 complaints
- India: 33 complaints
- Australia: 29 complaints
- Brazil: 14 complaints
- Mexico: 13 complaints

The [whistleblower] program creates a powerful inducement for those aware of wrongdoing to break their silence and it has been very successful, even transformative, in its impact.

- Andrew Ceresney, SEC Director of Enforcement

Mitigation: Implement an Effective Whistleblower Response Protocol

Before reports are made, companies should ensure that they have a system in place to respond to whistleblowers and investigate allegations.

BEST PRACTICES

- Review compliance & HR policies and procedures to ensure internal reporting is *easy, accessible, and perceived as a corporate priority*. Implement a comprehensive and organized system to catalogue and track complaints.
- Ensure that there are *robust, comprehensive investigative protocols* pursuant to which investigations are handled by *appropriate personnel*.
- Make clear that all employees who report will be treated with respect. Adopt a strict “*no-retaliation policy*” and communicate the results of investigations to whistleblowers to the extent possible.
- The SEC has chosen *120 days as a key milestone for investigations*: the Commission will not consider information for award-eligibility unless the reporter waited at least 120 days after making an internal report. Internal investigations that place a company in position to make a disclosure decision within 120 days should be deemed presumptively reasonable.
- *Consider retaining counsel*. Non-lawyer personnel conducting internal investigations (e.g., compliance or internal audit personnel or external investigators) are permitted to claim awards for information gleaned from investigations in certain circumstances.
- *Go beyond Dodd-Frank*. In recent years, key markets such as *India* and *China* have implemented or are considering new whistleblower protection laws. In China, these new laws have played an important role in President Xi Jinping’s anti-corruption campaign.



Four out of five anti-corruption investigations in China (part of President Xi Jinping’s high-profile anti-corruption campaign) were reportedly initiated by whistleblowers.



Sector Trend: Financial Services Industry Focus

The finance sector has been an area of continued focus for regulators:

- **BNY Mellon:** In the first of many expected settlements with financial services firms involving hiring, BNY Mellon paid \$14.8 million to settle allegations that it hired as interns family members—two sons and a nephew—of two key decision-makers of an existing client of the bank in order to maintain and grow future business with the client.
- **Allianz SE:** Allianz’s Indonesian subsidiary allegedly made improper payments to employees of SOEs from 2001-2008 to obtain or retain almost 300 insurance contracts for large government projects. The company paid more than \$12 million to settle the charges.
- **Garth Peterson (Morgan Stanley):** Former Managing Director of Morgan Stanley’s real-estate arm in China provided an executive of a Chinese state-owned entity with ownership interests in real estate in exchange for facilitating real estate transactions for the firm. While Mr. Peterson was charged as an individual, the SEC and DOJ both cited Morgan Stanley’s robust FCPA compliance program as a factor in its decision not to prosecute the firm.
- **Sovereign Wealth Fund Inquiries:** In 2011, the SEC sent letters to financial institutions seeking information relating to transactions with sovereign wealth funds. The SEC requested information on investments by sovereign wealth funds, services provided to the funds, and FCPA compliance with respect to the funds. The investigation likely focused on whether improper payments were made to sovereign wealth fund managers to win investments at the height of the recent financial crisis. The Department of Justice has recently joined the industry probe.

Trend: Greater Emphasis on Self-Disclosure and Cooperation in 2015 FCPA Enforcement Actions

Last year's enforcement actions highlight the profound effect disclosure and cooperation can have on prosecutorial decisions.

Louis Berger

- Louis Berger's *criminal fine was reduced substantially to \$17.1 million based on its voluntary disclosure* of the conduct in question, even though the disclosure came after DOJ's investigation of its predecessor entity for another matter.

FLIR Systems

- FLIR paid more than \$9.5 million to settle charges with the SEC resulting from a "world tour" of lavish travel expenditures and gifts provided to officials of the Saudi Arabian officials in 2009. The SEC favorably noted FLIR's *voluntary disclosure and remedial actions*.

Mead Johnson Nutrition

- The SEC specifically noted Mead Johnson's *failure to self-report* alleged misconduct in 2011, but credited its significant remedial measures and "*extensive and thorough cooperation*" with the SEC after conducting a second investigation in 2013.

"[T]here are significant dollars-and-cents savings for companies that self-disclose."
-Kara Brockmeyer, SEC FCPA Unit Chief (March 2015)

Mitigation: Develop a Disclosure Strategy

Thinking through potential disclosure issues and developing a comprehensive strategy before problems arise can reduce the risk of hasty decisions and help companies take full advantage of disclosure benefits.

Key Considerations when Contemplating Disclosure:

- Whether the conduct is systemic or isolated
- U.S. contacts; strength of jurisdictional arguments
- Amount/frequency of improper conduct
- Clarity of violation; strength of evidence
- Potential to lead to local enforcement action
- Disclosure obligations from prior settlements
- Risk of reputational harm
- Remedial measures undertaken

“[C]ompanies that fail to self-disclose but nonetheless cooperate and remediate will receive some credit. But that credit . . . will be measurably less than it would have been had the company also self-reported.”



- Leslie Caldwell, Assistant Attorney General (Nov. 2015)

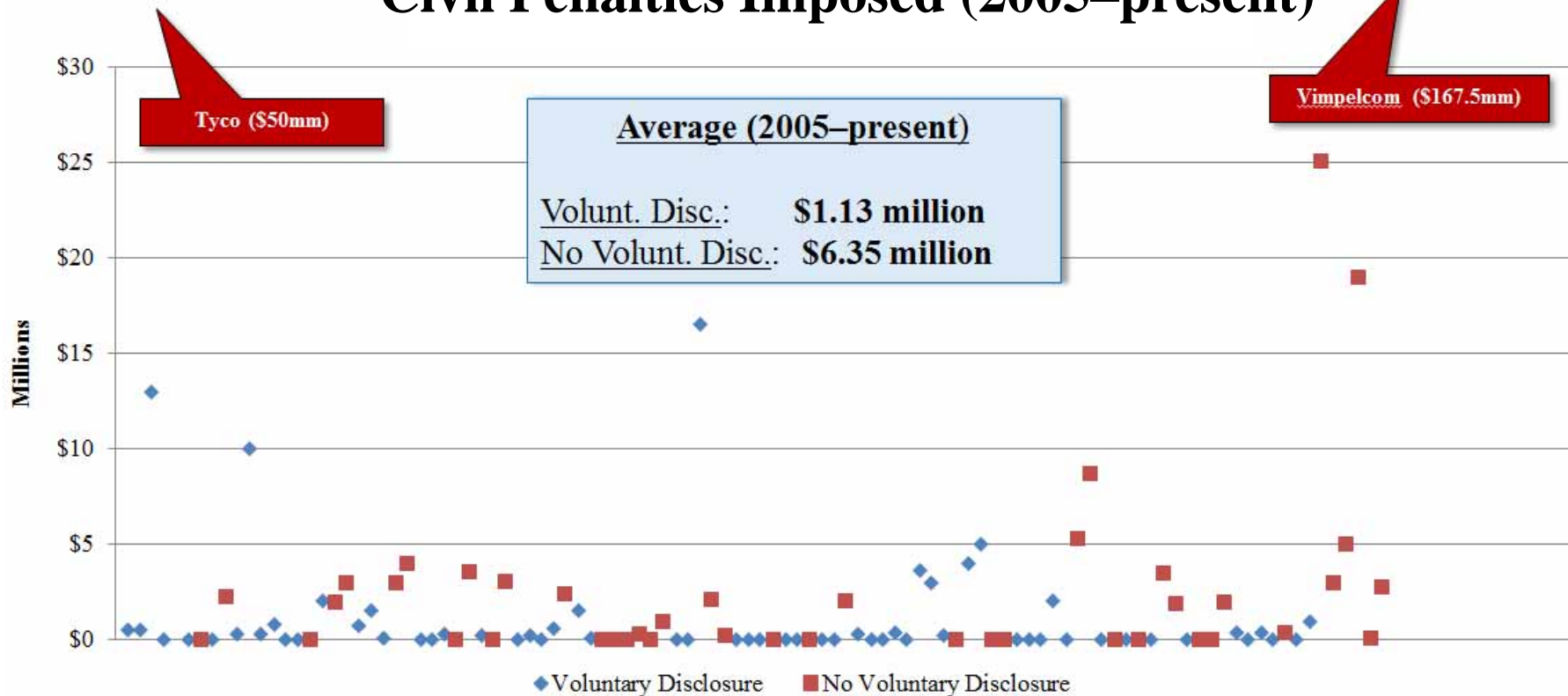
Potential Benefits of Disclosure:

- Shorter Investigations: The length of investigations (initiation to resolution) has been, on average, shorter when accompanied by a voluntary disclosure.
- Leniency in Charging Decisions: Self-disclosure can lead to potential leniency in charging decisions, including a lower rate of mandatory guilty pleas, a higher likelihood of criminal NPAs, and a higher likelihood of SEC-only resolutions.

Deciding to Disclose: Potential Advantages

The average civil penalty imposed since 2005 was nearly six times higher in cases where companies did not self-disclose than in cases where they did.

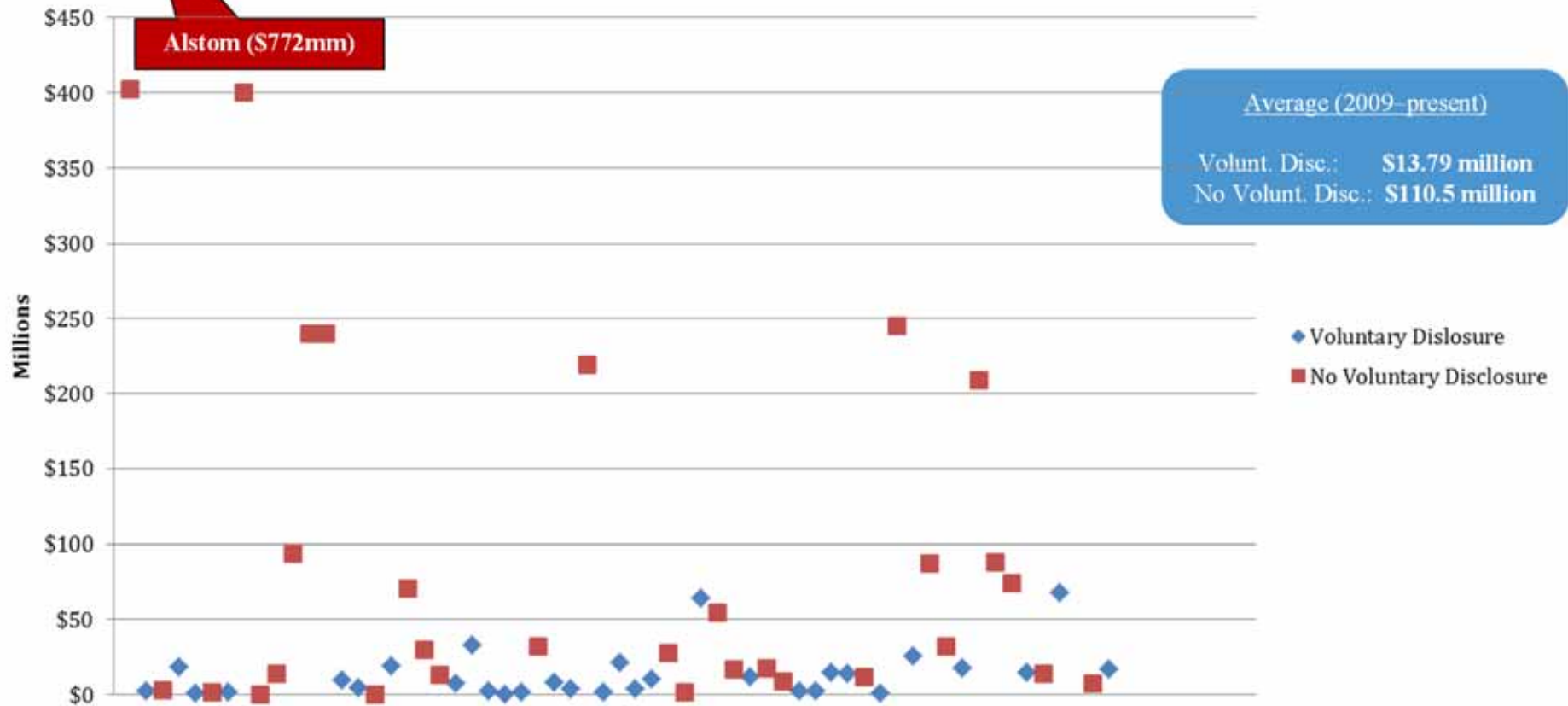
Civil Penalties Imposed (2005–present)



Deciding to Disclose: Potential Advantages

The average criminal fine imposed since 2009 was eight times lower in cases where companies self-disclosed than it was in cases where they did not.

Criminal Fines Imposed (2009–present)



Trend: Third Parties Remain the Single Greatest Area of Corruption Risk

Issues involving third parties have been at the core of recent enforcement actions conducted by the SEC, DOJ, and local enforcement agencies. High-risk third parties may include:

China: Consultants, Design Institutes, PR/Marketing Firms, Event Organizers, Travel Agents, Distributors

India: Sales Agents, Distributors, Tendering/Procurement Agents, Government Liaison Agents, Logistics Providers, Joint Venture Partners, Fictitious Vendors

Middle East: Joint Venture Partners, Travel Agents

Africa: Market entry consultants, government-designated service providers, consultants

Iran Oil Minister Brands Middlemen “Corrupt Parasites”

“Iran's Oil Minister Bijan Zanganeh launched a blistering attack Monday on industry middlemen, branding them “parasites that want to suck the nation’s blood” for their own financial benefit.

Sanctions relief could unlock Iran, which has the world's largest combined oil and gas reserves, from decades of under-investment and stifled production.

But emerging opportunities come after a string of corruption scandals in which middlemen were allegedly co-opted by past governments to circumvent oil sanctions, pocketing commissions.

One of them, Babak Zanjani, currently on trial for fraud and economic crimes, is accused of pocketing \$2.8 billion (2.5 billion Euros) during former president Mahmoud Ahmadinejad's tenure. Zanjani could face the death penalty if he is convicted.” -AFP (October 19, 2015)

Mitigation: Carefully Monitor High-Risk Third Parties

Third parties are often an inevitable part of doing business in an emerging market. Pre-engagement screening, as well as close monitoring, can help offset the decreased transparency and control that comes with agents and intermediaries.

Best Practices

- Identify the specific *functions that are prone to corruption* and handled by third parties.
- *Involve legal and compliance* in contract negotiations/drafting to ensure that services are specifically and accurately described and allow for an efficient control (e.g., finance) to assess whether the services have actually been rendered and whether prices are reasonable in light of those services and are in line with market rates.
- Include *audit rights with a trigger in third-party agreements* to allow for audits when indicated.
- Conduct *specific training for employees* working with third parties and with end customers.
- Use a risk-based approach to periodically select third parties for an *audit review*.
- Ensure that *rebates, credit notes, and other payments* provided to the third party are made to the contracting entity, including identifying any offshore arrangements.
- Understand *interaction between sales force in emerging markets, involved third parties (e.g., distributors, agents) and end-customers*, and conduct function-specific compliance training with these employees.
- Understand whether *margins of intermediaries are passed on to end-customers* by reviewing publically available tender materials or conducting audit reviews.

Risk: Successor Liability in M&A Transactions.

U.S. courts recognize theories that allow holding companies liable for the past acts of an acquired entity.

eLandia—A Cautionary Tale

- In June 2007, eLandia acquired Latin Node, a telecom services provider.
- In August 2007, during a post-acquisition financial integration review, eLandia discovered evidence that Latin Node paid approximately \$2.25 million in bribes to Honduran and Yemeni government officials between March 2004 and June 2007.
- eLandia voluntarily reported the payments to the DOJ, eventually paying a \$2 million fine and placing Latin Node into bankruptcy.
- The first FCPA enforcement action based entirely on pre-acquisition conduct that was unknown to the acquirer when the transaction closed.
- eLandia's entire \$22+ million investment in Latin Node reportedly wiped out due to inflated acquisition price of corrupt company and investigation costs.

A “cautionary tale” of what can happen when an acquirer conducts “little, if any, [FCPA] due diligence.”

— Former DOJ FCPA Unit Chief (Nov. 17, 2009)

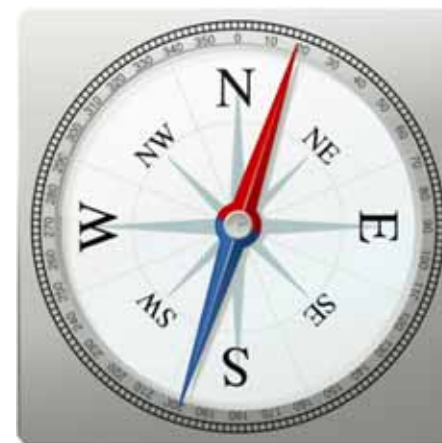
Mitigation: Take Steps to Avoid Incurring Liability Through Acquisitions

A 2014 DOJ Opinion Procedure Release highlighted steps companies may take to avoid FCPA violations in the context of acquisitions.

In 2014, a U.S. consumer products company told the DOJ it intended to acquire 100% of the shares of a foreign consumer products company and its subsidiary. In the course of pre-acquisition due diligence, the Company discovered over \$100,000 in transactions that raised compliance issues—the vast majority involving payments to foreign officials—and “substantial weaknesses” in accounting and recordkeeping. DOJ stated that it lacked jurisdiction to prosecute for the improper payments, and therefore would not take action, as none of the improper payments had a jurisdictional nexus to the U.S.

However, the November 7, 2014 Opinion Release reiterated DOJ/SEC guidance to:

- Conduct thorough *risk-based* FCPA and anti-corruption *due diligence*;
- Implement the acquiring company’s *code of conduct and anti-corruption policies* as quickly as possible;
- Conduct FCPA and other *relevant training* for the acquired entities’ directors and employees, as well as third-party agents and partners;
- Conduct an FCPA-specific *audit of the acquired entity* as quickly as practicable; and
- *Disclose* any corrupt payments discovered during the due diligence process.



Trend: Rise of World Bank Enforcement

Companies contracting with the World Bank must be mindful of the risk of enforcement when operating in emerging markets.



- The World Bank holds accountable the institutions to which it lent nearly \$42.5 billion in fiscal year 2015 through its sanctions and debarment program.
- In FY 2015, the World Bank Group sanctioned 71 entities and debarred 65 entities to terms ranging from six months to 13 years; these included actions against companies based in Germany, the U.S., Cambodia, and Spain for conduct involving alleged illicit payments to government officials and failures to disclose agency arrangements.

Key Lesson: As with U.S. regulatory agencies, cooperation and remediation are given heavy weight: *“This case offers a clear example of how a company shifted course and sought corrective action in light of investigative evidence. Our objective is to work with more companies to achieve that goal.”*

-World Bank Integrity Vice President Leonard Frank McCarthy

Mitigation: Understand Key Difference Between FCPA Enforcement Authorities and the World Bank

There are significant differences between World Bank and U.S. government enforcement actions. Understanding these differences can guide an effective response and cooperation strategy.

Measurement	FCPA Enforcement	World Bank Sanctions
Frequency of enforcement actions	U.S. DOJ and SEC initiated 113 FCPA enforcement actions in 2011-2014	The World Bank publicly sanctioned over 300 entities and numerous subsidiaries in 2011-2015
Burden of proof required	Criminal enforcement actions require proof of conduct “beyond a reasonable doubt”	Uses “more likely than not” standard
Potential consequences prior to conclusion of action/proceedings	None	Temporary suspension of six months (with potential six-month extension) possible prior to completion of investigation
Rules of Evidence	Federal Rules of Evidence	No formal rules of evidence to guide sanctions proceedings
Collateral Consequences	Derivative lawsuits, compliance monitorships, class action lawsuits, tax law implications.	Debarment by other multilateral development banks through cross-debarment agreements, enforcement of World Bank sanction by international financial institutions under mutual agreements, referrals to national authorities by the World Bank

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