



GIBSON DUNN

**Webcast: FCPA Trends in the Emerging Markets of  
Asia, Russia, Latin America and Africa**

*12th Annual Webcast*

F. Joseph Warin  
Kelly S. Austin  
Joel M. Cohen  
Benno Schwarz  
Patrick F. Stokes  
Karthik A. Thiagarajan  
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# MCLE Certificate Information

## **MCLE Certificate Information**

- Most participants should anticipate receiving their certificate of attendance in eight weeks following the webcast.
- Please direct all questions regarding MCLE to [CLE@gibsondunn.com](mailto:CLE@gibsondunn.com).

# Presenters



**F. Joseph Warin**

Partner  
Washington, D.C. Office  
Tel: +1.202.887.3609  
Fax: +1.202.467.0539  
FWarin@gibsondunn.com



**Joel M. Cohen**

Partner  
New York Office  
Tel: +1.212.351.2664  
Fax: +1.212.351.5264  
JCohen@gibsondunn.com



**Kelly S. Austin**

Partner  
Hong Kong Office  
Tel: +852.2214.3788  
Fax: +852.2214.3710  
KAustin@gibsondunn.com



**Benno Schwarz**

Partner  
Munich Office  
Tel: +49.89.1893.3210  
Fax: +49.89.1893.3333  
BSchwarz@gibsondunn.com



**Patrick F. Stokes**

Partner  
Washington, D.C. Office  
Tel: +1.202.955.8504  
Fax: +1.202.467.0539  
PStokes@gibsondunn.com



**Karthik A. Thiagarajan**

Of Counsel  
Singapore Office  
Tel: +65.6507.3636  
Fax: +65 6507.3650  
KThiagarajan@gibsondunn.com

# Topics to Be Discussed

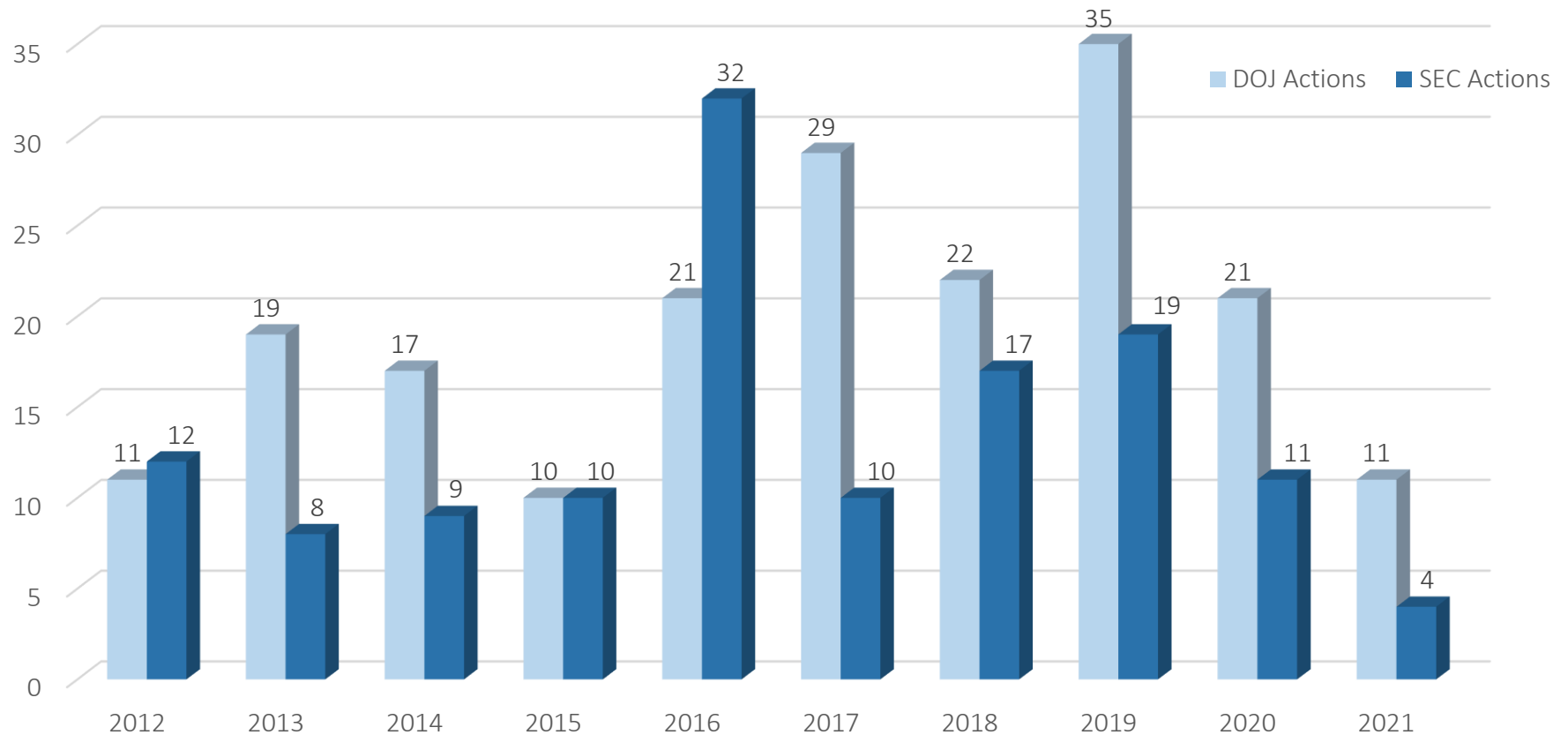
- **An Overview of FCPA Enforcement**
- **Emerging Market Anti-Corruption Enforcement and Trends:**
  - China
  - India
  - Latin America
  - Africa
  - Russia
- **Global Trends and Risk Mitigation Strategies**
- **Appendix: The FCPA**

# An Overview of FCPA Enforcement

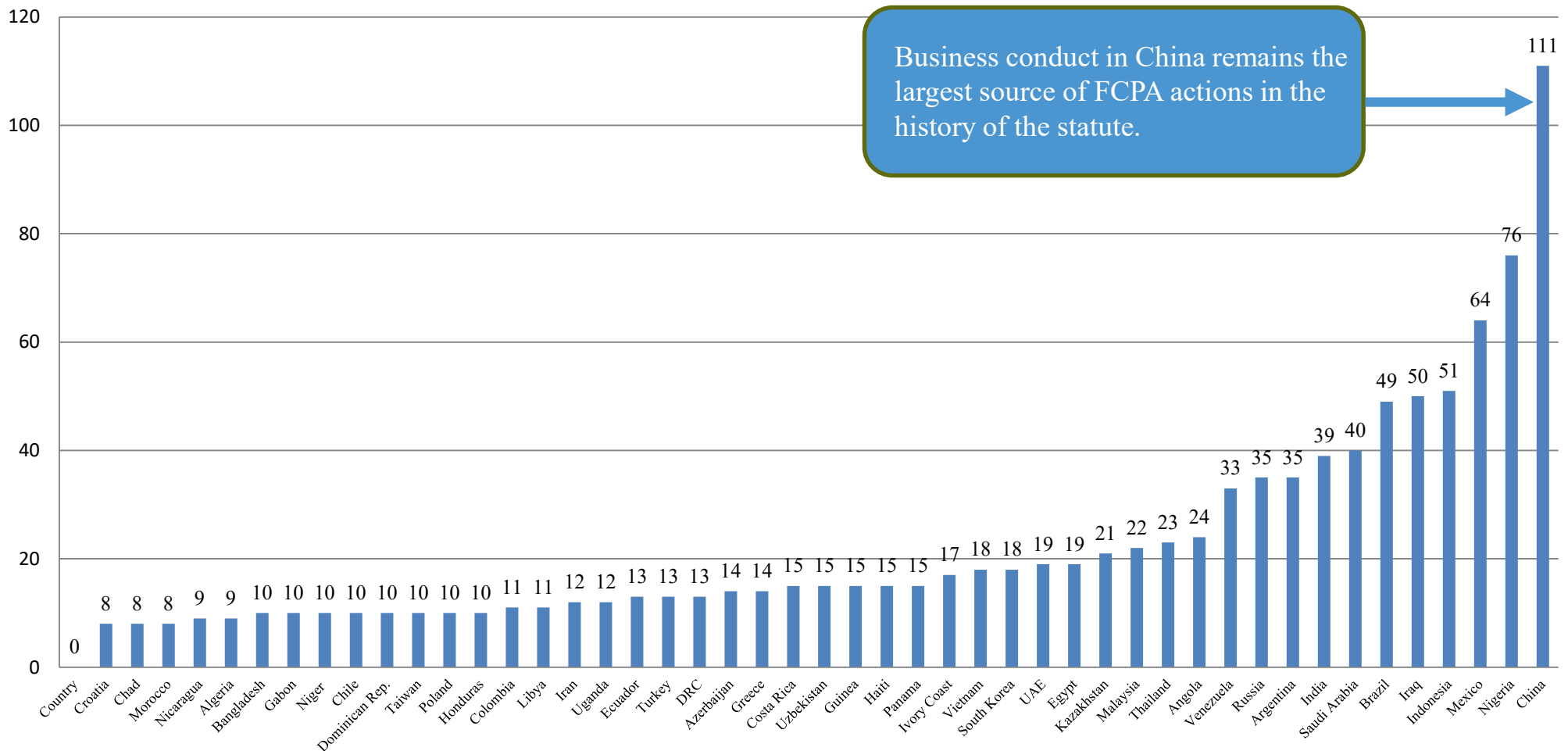


# FCPA Enforcement Actions Per Year (2012-2021)

Number of FCPA Enforcement Actions Per Year



# Number of FCPA Enforcement Actions by Country (1978 to Present\*)



\* Minimum eight enforcement actions.

# Enforcement of the FCPA: Criminal Penalties

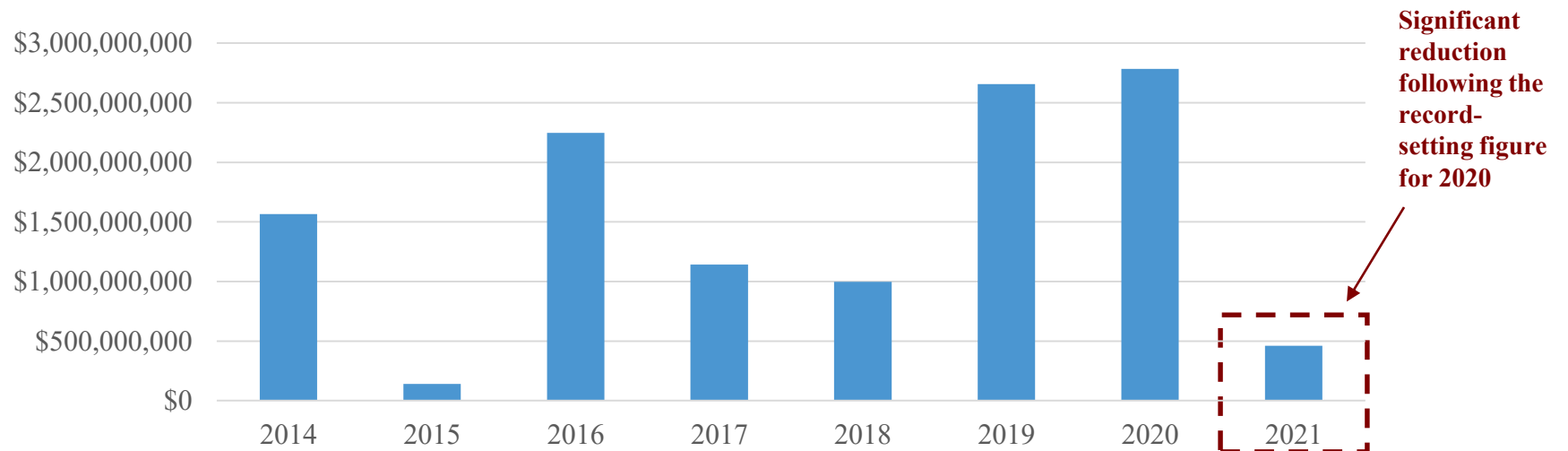
## Anti-Bribery Provisions

- **Corporations:** USD 2 million fine *or* twice the pecuniary gain or loss.
- **Individuals:** Up to 5 years' imprisonment, *and* a USD 250,000 fine *or* twice the pecuniary gain or loss.

## Accounting Provisions

- **Corporations:** Criminal penalties up to a USD 25 million fine *or* twice the pecuniary gain or loss.
- **Individuals:** Up to 20 years' imprisonment, *and* a USD 5 million fine *or* twice the pecuniary gain or loss.

## Total Value of Corporate FCPA Monetary Resolutions (2014 – 2021)





# Enforcement Actions of 2021 By Value

Both the DOJ and the SEC brought fewer enforcement actions in 2021 compared with previous years, and the fines were also lower.

No.	Company	Total Resolution	DOJ Component	SEC Component	Jurisdiction(s) in which alleged misconduct occurred	Date
1	Credit Suisse	USD 357,417,137	USD 258,365,265*	USD 99,051,872	Mozambique	10/19/2021
2	WPP plc	USD 19,224,660	USD 0	USD 19,224,660	Brazil, China, India, Peru	09/24/2021
3	Deutsche Bank AG	USD 43,329,622	USD 0**	USD 43,329,622	China, Italy, UAE	01/08/2021
4	Amec Foster Wheeler	USD 41,139,287***	USD 18,375,000	USD 22,764,287	Brazil	06/25/2021

\* Total amount paid by Credit Suisse Group AG and Credit Suisse Securities (Europe) Ltd. Of this, USD 24,752,000 was paid to the U.K. Financial Conduct Authority in its parallel proceeding.

\*\* In related proceedings in 2020, USD 79,561,206 was paid to the DOJ by Deutsche Bank Aktiengesellschaft.

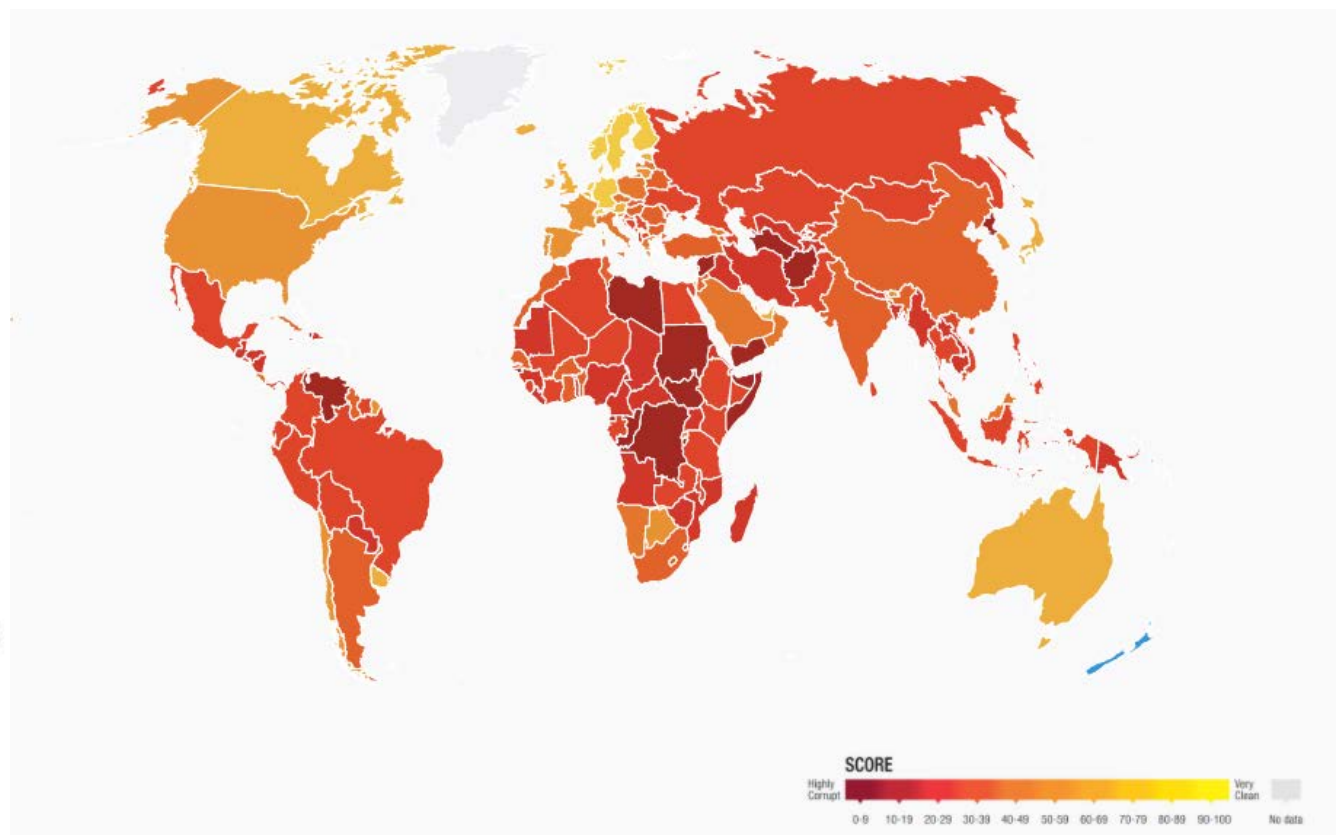
\*\*\*Total amount paid by Amec Foster Wheeler Energy Limited and Amec Foster Wheeler Limited. Of this, USD 12,636,975 in disgorgement was paid to authorities in Brazil and the U.K. by the SEC, while the DOJ agreed to credit up to USD 10,718,750 of its fine to authorities in the U.K. and Brazil.

# Corruption Trends: Asia, Russia, Latin America, and Africa



## CORRUPTION PERCEPTIONS INDEX 2020

The perceived levels of public sector corruption in 180 countries/territories around the world.



# China



# China: Market Characteristics



**1.4 billion**

Estimated population of China in 2021. Median age of 38.4.

**USD 581.72 billion**

China's annual foreign trade surplus through November 2021.

**22%**

Percentage increase in China's exports from a year ago.

**~8%**

Estimated GDP growth in 2021, a 6% increase from 2020.

**1.80%**

China's projected inflation for 2022.

**USD 157.2 billion**

Foreign direct investment into China through November 2021, a 15.9% increase year-on-year.

# China: Corruption Landscape

China ranks **78<sup>th</sup>** out of 180 countries in Transparency International's latest Corruption Perceptions Index, a two-spot increase from last year's rankings.



According to World Bank's Global Governance Indicators, China improved from the **33<sup>rd</sup>** percentile in 2010 to the **53<sup>rd</sup>** percentile in 2020 on "control of corruption."



76,259

Number of officials disciplined by CCDI in China in 2021 (through October) for violations of the "Eight Rules" (including embezzlement, bribery, abuse of power, misappropriation, dereliction of duty, and malpractice).

79,768

Number of cases investigated by CCDI in China in 2021 (through October) for violations of the "Eight Rules."

# China: National Legislative Developments

## Pilot Program for Corporate Criminal Compliance (“Pilot Program”)

- Developed by China’s Supreme People’s Procuratorate (“SPP”) and similar to U.S. deferred prosecution agreements.
- Encourages local procuratorates to grant non-arrest or non-prosecution decisions, or propose lighter penalties for corporate criminal cases, *in exchange for companies implementing compliance and remediation plans*.
- The SPP confirmed that commercial bribery is a “typical” case under the Pilot Program.
- Both corporations and their principals can qualify for the Pilot Program. Compliance undertakings can include reporting periods, compliance agreements, and implementing compliance and reporting programs.

## Third-Party Supervision and Evaluation Mechanism (Supplement to the Pilot Program)

- Allows companies that qualify for the Pilot Program to apply for or be nominated for a third-party compliance monitoring program *in the hope of obtaining a non-arrest or non-prosecution decision or lighter penalty*.
- The third-party organization will be selected by a “management committee” established by the SPP and other authorities.
- The third-party organization will (i) review and revise the proposed compliance program, (ii) inspect the implementation of the compliance plan, and (iii) submit a report to the local SPP, who then make an arrest/prosecution/penalty decision.

### Example Cases

- In April 2020, an audio equipment supplier in Shenzhen was suspected of bribing customers to secure advantages in the procurement process. The procuratorial agency did not prosecute the bribe-giver and signed a compliance supervision agreement with the company requiring it to develop a compliance program.
- In 2021, a company based in Zhejiang, which pled guilty to falsely issuing VAT invoices, was reportedly granted leniency after successfully implementing a corporate compliance plan.

### Key Takeaway

Multinational companies with operations in China should ensure their local compliance programs are operating effectively, while monitoring developments related to China’s Pilot Program for Corporate Criminal Compliance.



# China: National Legislative Developments

## Implementing Regulations for the Supervision Law of the PRC

- The National Supervision Commission, a Central Government body established in 2018, is responsible for supervising anti-corruption efforts countrywide.
- In September 2021, the National Supervision Commission promulgated the *Implementing Regulations for the Supervision Law*, which seek to strengthen supervision over anti-corruption work by standardizing the scope, jurisdiction, and procedures of China’s supervisory organs at the provincial and local levels.

## Opinions on Further Promoting the Investigation of Bribery and Acceptance of Bribes (the “Opinions”)

- In September 2021, the Central Commission for Discipline Inspection (“CCDI”) and the National Supervisory Commission issued the Opinions regarding the investigation of and punishment for bribery.
- The Opinions note that investigations should *focus on bribe-givers as well as bribe-receivers*, particularly those concerning high value bribes, Party or state officials, and major state projects.
- The CCDI and the National Supervisory Commission will *explore the implementation of a “blacklist”* for bribe givers and explore joint punishments with other departments or agencies.

### Key Takeaways

- Companies should be mindful of the implementation of a “blacklist” system, whereby those who are listed on a “blacklist” due to violation of anti-bribery rules may face restrictions imposed upon their business operations.
- The Opinions follow amendments to the PRC Criminal Law that came into force on March 1, 2021, which equated the maximum criminal penalties for bribes received by state and non-state functionaries. The combined effect of these legislative changes will likely lead to increased enforcement related to receipt of bribes by non-state functionaries and bribe-giving activities.

# China: National Legislative Developments

## Data Protection Laws Relevant to Cross-Border Investigations Involving China

### Data Security Law (“DSL”)

- The law governs data processing and management activities both within and outside of China and prohibits providing data stored in China to foreign enforcement bodies ***without approval from the Chinese government.***

### Personal Information Protection Law (“PIPL”)

- The law requires personal information handlers to obtain voluntary, explicit and informed consent from individuals before processing personal data, except in limited circumstances. In addition, the law requires that separate consent be obtained in specific circumstances e.g., the processing of sensitive personal information.

### Consent Exemptions

- There are exemptions to the consent requirement, such as performing a contractual or statutory duty, public interest, or responding to an emergency involving life and property.
- These exemptions are stricter than in certain other jurisdictions in Asia as China has ***no exemption for conducting internal investigations.***

### Key Takeaways

- Companies and their counsel must ***ensure the consent requirement is satisfied*** before gathering personal information from employees during an internal investigation.
- Companies must ***comply with cross-border data transfer requirements*** before transferring any data outside of China and continue to monitor developments with regard to the Draft Measures for Data Export Security Assessment published in October 2021 by the Cyberspace Administration of China.
- Companies must ***get approval from the relevant Chinese authorities*** before supplying data to foreign law enforcement authorities.
- Review corporate compliance policies to ensure compliance with the new data protection rules.
- Seek local counsel advice regarding all aspects of data protection compliance; only PRC counsel can advise on PRC law.



# China: Enforcement Trend – Tech Sector

In 2021, Chinese regulators have continued to focus on enforcement in the *tech sector* in a host of regulatory areas, including *antitrust and data privacy*. The Chinese government's focus on the tech sector has extended to increased scrutiny of *senior management* at leading firms, resulting in increased anti-bribery and anti-corruption enforcement in the sector.

- In July 2021, *Senior Product Operator and Product Operation Manager of Baidu*, Xue Fei, was convicted for accepting bribes (RMB 30,000 (~ USD 4,700)) in cash and a car worth more than RMB 700,000 (~ USD 110,000)) from an individual named Zhang Wei. Zhang paid Xue to become the owner of a social media forum on Baidu. Zhang was also convicted of bribing a non-state functionary.
- In August 2021, the *former Senior Public Relations Director of Weibo*, Mao Taotao, had his employment terminated and was arrested by the police on suspicion of accepting bribes.
- In November 2021, the *Assistant General Manager of Tencent PCG* (Platform and Content Business Group), Zhao Mowei, was found guilty of abusing his position by accepting bribes in the form of travel services from suppliers.



# China: Enforcement Trend – Healthcare Sector

In 2021, the Chinese government continued implementing policy changes and launched nationwide campaigns **targeting the healthcare industry** as part of its anti-bribery and anti-corruption efforts:

- In April 2021, nine central government authorities jointly announced a plan to correct misconduct in the healthcare industry, including examining kickbacks taken by healthcare professionals and referring kickback-paying companies to law enforcement.
- In April 2021, Chinese Ministry of Finance (“MOF”) punished 19 pharmaceutical companies after an accounting review. The companies violated China’s Accounting Law by (1) using **inflated or irrelevant fapiao and invoices** to generate funds; (2) obtaining funds through **fabricated business expenses or marketing activities**; and (3) failing to comply with **Chinese accounting and auditing standards**.
- In July 2021, the CCDI reviewed its local branches’ progress in investigating bribery cases involving healthcare professionals and emphasized the importance of **investigating bribe-giving as well as bribe-receiving**. The CCDI reported that local CCDIs in Sichuan and Jiangsu have employed the use of “blacklists” of pharmaceutical companies, suppliers and agents with a history of commercial bribery to put medical institutions on notice and/or make it more difficult for these companies to pay bribes.



# Lessons Learned from 2021 FCPA Enforcement Actions Involving China

## WPP

**Background:** WPP's subsidiary in China allegedly avoided paying taxes to a Chinese tax authority by making payments to a vendor identified by tax officials and providing gifts and entertainment to tax officials. The SEC noted that WPP failed to uncover the scheme despite the presence of red flags. Notably, an internal audit in 2017 determined that the Chinese subsidiary was using tax avoidance schemes, but WPP allegedly failed to follow up on the allegations.

**Lessons:** (1) ensure adequate procedures are in place to investigate and respond to red flags indicating corruption risks, including audits; (2) ensure effective oversight of employees responsible for dealing with government agencies; (3) ensure sufficient anti-corruption controls are in place when onboarding new vendors as payees.



**Background:** According to the SEC Order, Deutsche Bank retained a consultant to help it establish a clean energy investment fund with a Chinese state entity. The consultant was allegedly himself a government official and a close friend of an official whose approval was needed to form the fund. The SEC alleged that the Bank's due diligence on this consultant was insufficient, and stated in the Order that the Bank paid the consultant consultancy fees, reimbursed the invoices submitted by the consultant for gifts and entertainment given to officials without following the appropriate procedure, and agreed that the consultant would have a partnership interest in the fund.

**Lessons:** (1) conduct appropriate due diligence before entering into contractual agreements with third parties; (2) enhance oversight of employees' interactions with third parties, such as consultants; (3) ensure adequate oversight over invoices submitted by third parties, particularly third parties that diligence indicates may have links to foreign public officials.

# INDIA



Photo courtesy Varshesh Joshi

# India: Market Characteristics & COVID-19 Impact



**33%**

Reduction in estimated size of “Middle Class” in India from 2020-2021 as a result of COVID-19. The figure shrank from 99 to 66 million people over this period.

**59%**

Domestic consumption as a percentage of India’s GDP.

**USD 59 Billion**

Among top 10 FDI recipients as at end of Q2 2021.



**9.5%**

Projected growth of the Indian economy in 2021 – bouncing back after a 7.3% contraction in 2020.

**2<sup>nd</sup>**

Second highest country in confirmed COVID-19 cases.

Photo courtesy Prakash Hatvalne



# India: Trends Over the Last Decade v. Situation on the Ground

India has made slow progress on anti-corruption indices over the last decade:



91 >>> 86

India moved up 5 spots on TI's Corruption Perception Index. It had moved up by 11 spots until 2019, but fell back over the last year.



38.6 >>> 46.6

India's percentile rank for "control of corruption" improved between 2010 and 2020.

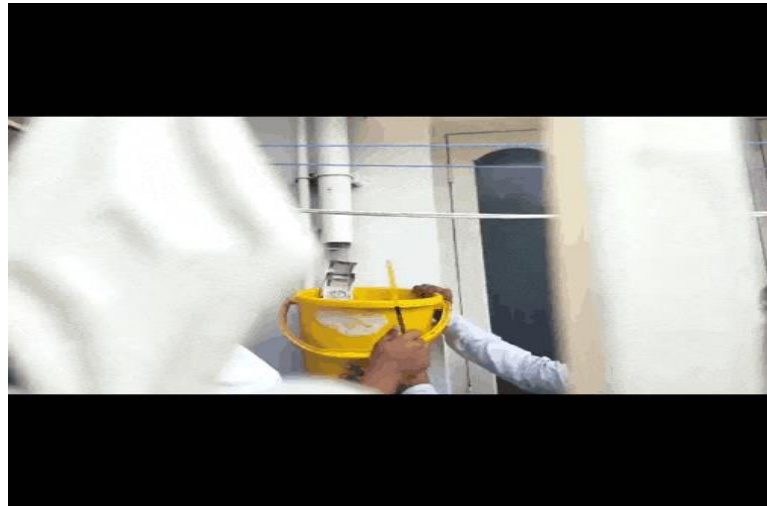
However, the bureaucratic labyrinth at the federal and provincial levels and poor anti-corruption enforcement has allowed bribery and corruption to flourish:

67%

2 in 3 companies experienced at least one fraud event in 2021.

39%

of Indian public service users paid bribes in a 12-month period to access services – the highest rate amongst Asian jurisdictions.



*Cash being recovered from the drain-pipe of a public official's home in India*

## Slow Progress on Anti-Corruption Initiatives:

- Despite legislation in 2014 establishing the Lokpal, India's anti-corruption ombudsman, the members were not appointed until 2019 and the body did not become fully operationalized until March 2020.
- The prosecution wing of the Lokpal is yet to be operationalized.
- General laws still provide no protection to whistleblowers.
- No provisions in Indian law cover bribery of foreign officials.
- India has slipped to 82nd position in the TRACE ranking for 2021, five places down from 77th rank last year. The ranking measures business bribery risks.

# India: Key Provisions and Requirements under India's Anti-Corruption Laws

## Prevention of Corruption Act, 1988 (“PCA”)

### A. Demand Side Prohibitions

- § 7 – Indian public servants must not obtain “undue advantage” with the intention of (or as a reward for) performing a public duty “improperly or dishonestly” or forbearing to perform such duty. (§ 7A targets intermediaries).

### B. Supply Side Prohibition

- Amendments to the PCA in 2018 introduced a specific provision (§ 8) that prohibits the giving of an “undue advantage” to anyone with the intent of inducing or rewarding the improper performance of a public duty by a public servant. ***No exception for facilitation payments.***

### C. Obligations/Liabilities under the PCA

- § 9 – commercial organizations can be liable for violation of supply side prohibition by persons associated with such organization (to benefit the organization). ***A foreign parent company can be held liable for the actions of its Indian subsidiary.***
- § 10 – managerial personnel of an organization will be liable for up to 7 years’ imprisonment and/or fines if such personnel consent to or connive with the offender under the PCA.

## Companies Act, 2013

### A. Key Requirements

- § 134(5) – annual certification by company directors that “proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively” are in place.
- §§ 134(8), 447 – significant penalties (fines/imprisonment) for fraud and non-compliance.

### B. Disclosure Obligations

- Statutory auditors must disclose instances of fraud
- Guidance by the Institute of Chartered Accountants urges auditors to report bribes and corrupt acts.
- Broadly, for frauds involving INR 10 million (USD 132,000), auditors must notify the board and obtain a response within 45 days, before these are forwarded by the auditors to the government.
- ***Board is required to disclose details of fraud and remedial action taken in the annual report*** that is filed by the company with the Registrar of Companies.

# India: Disclosure Requirements Regarding Compliance and Investigations

**India has recently introduced obligations that impact the way companies respond to compliance-related reports and conduct internal investigations.**

## **A. Forensic Audit Disclosures**

Since September 2020, companies listed on Indian stock exchanges must disclose information regarding the initiation of any forensic audit, irrespective of materiality. A listed company must disclose:

- that it has initiated a forensic audit;
- the name of the entity initiating and the reasons for initiating the forensic audit; and
- the final forensic audit report, along with any comments from company management.

## **B. Disclosure Obligations – Whistleblower Reports**

From FY 2021-2022, additional audit requirements apply to Indian companies (other than certain classes of private unlisted Indian companies) and their statutory auditors.

- Companies are required to share information on whistleblower complaints received during the financial year with their statutory auditors.
- Statutory auditors must consider these complaints and how they were handled by the company.

### **Key Takeaways**

- Indian regulations increasingly rely on statutory auditors to ferret out and address instances of corporate fraud.
- Even smaller companies—including Indian subsidiaries of foreign companies—must consider implementing robust ethics reporting and handling procedures.



# India: A Federal System with Multiple, Intersecting Enforcement Agencies

Understanding the scope of each agency is important. Each agency may have different approaches and priorities.



- Lokpal, the new federal anti-corruption watchdog, commenced operations in March 2020.
- Lokpal has broad powers to investigate any person (including legal entities) involved in **aiding violations of the PCA, bribe giving or taking, or conspiracy** related to any violation of the PCA.
- As of August 2021, Lokpal has received 1,549 complaints in total. Of these, only 12 were registered in the current financial year, and only 110 during 2020-2021.
- Information on the rules and format for filing complaints with Lokpal was published in March 2020.

# India: Trend — Dip in Domestic Anti-Corruption Enforcement Against Public Officials

The 2018 amendments to the PCA may be responsible for hampering anti-corruption enforcement.

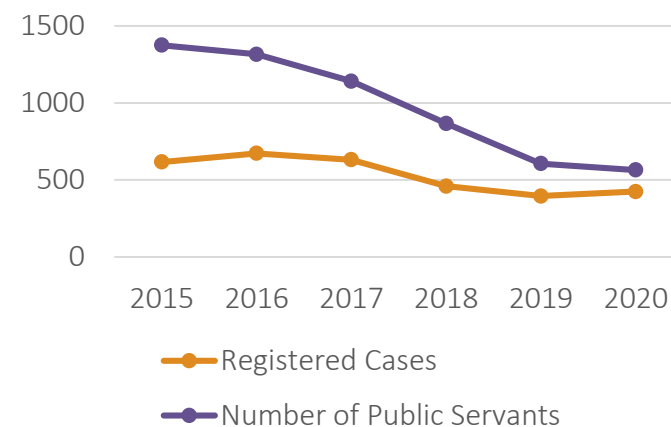
## The 2018 Amendments

- Under a new provision of the PCA (Section 17A), prior approval of the relevant government (state or central government or other competent authorities) is required to even commence any investigation into the commission of an alleged offence under the PCA.
- Previously, prior governmental permission was only required for prosecution of public officials.
- Sanction may be withheld by the relevant state or central government for political reasons, which may stymie investigations and enforcement.

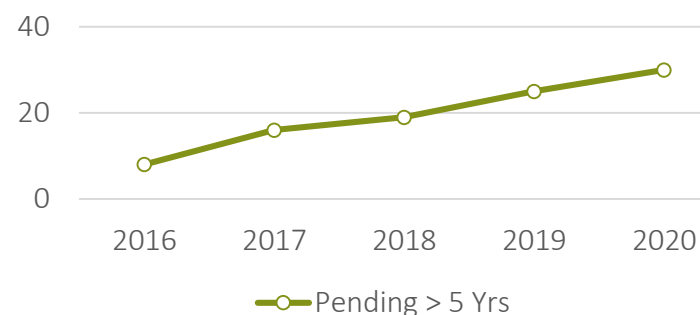
## Key Enforcement Statistics

- The decline in the number of cases registered under the PCA accelerated between 2017 and 2019 and stabilized in 2020.
- Cases that are pending investigation after 5 years have steadily increased, though the number of cases in which investigation is pending for more than 1 year has decreased.

Cases Registered under the PCA



Pendency of Investigations



Sources: Annual Reports of the Central Vigilance Commission 2016 – 2020; Indian Express (November 2021)

# India: Trend —Are Central and State Government Relations Hampering Enforcement Actions?

The Indian state has a federal structure. Executive and other powers are divided under India's constitution between the central government and state governments. This has implications for anti-corruption enforcement.

## The Requirement for State's Consent

- 'Police' and 'Public order' falls within the domain of state governments in India.
- The Central Bureau of Investigation (CBI) (under the central Government), requires the consent of the relevant state government to undertake investigations inside the territory of that state unless the Supreme Court of India or a High Court orders the CBI to do so.
- Some states have provided 'general consent' – an omnibus authorization for the CBI to investigate corruption cases within the state's territory as they arise.
- Some states have withdrawn the 'general consent' they had previously provided to the CBI.
- In the absence of 'general consent', the central government has to first obtain specific consent from the state government on a case-by-case basis.

## Central Versus States

- These tensions are heightened when the government at the state level is ruled by a different political party/coalition from that at the central government.
- The states that have withdrawn 'general consent' are 'opposition ruled' states.

## States That Have Withdrawn General Consent

Chattisgarh  
Jharkhand  
Kerala  
Maharashtra  
Mizoram  
Rajasthan  
West Bengal

## Cases Pending Specific Consent

150

Sources: CBI; Scroll.in (November 2021)

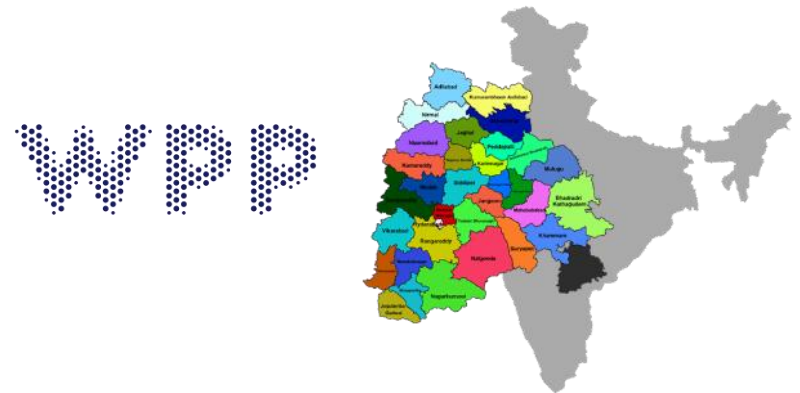
# India: Bribery at WPP

## Background

- In September, it was announced that the world's largest advertising group, WPP plc, would pay more than USD 19 million to the SEC to settle charges of various violations, including that of bribing Indian government officials through its Indian subsidiaries in return for advertising contracts.
- The SEC said a bribery scheme took place at WPP's majority-owned subsidiary in India. Through intermediaries, the India operation paid as much as USD 1 million in bribes to Indian officials to obtain and retain government business. The SEC alleged that the India subsidiary continued to pay bribes even though WPP repeatedly received anonymous complaints about the conduct.
- As a result of the bribery schemes at the India subsidiary, WPP was unjustly enriched by approximately USD 5.7 million.

## Enforcement Action

- WPP agreed to:
  - cease and desist from committing violations of the anti-bribery, books and records, and internal accounting controls provisions of the FCPA.
  - pay USD 10.1 million in disgorgement, USD 1.1 million in prejudgment interest, and a USD 8 million penalty.



Sources: Telangana State Portal; SEC

# India: Lessons Learned From the WPP Case

## Compliance Issues According to the SEC:

- WPP implemented an aggressive business growth strategy that included acquiring majority interests in many localised advertising agencies in high-risk markets.
- WPP failed to extend its internal accounting controls and compliance policies to the acquired subsidiaries and instead allowed the founders and CEOs of the acquired entities to exercise wide autonomy and outsized influence.
- On account of these structural deficiencies, WPP failed to promptly or adequately respond to repeated warning signs of corruption or control failures.
- The SEC noted that “*A subsidiary in India continued to bribe Indian government officials in return for advertising contracts even though WPP had received seven anonymous complaints touching on the conduct.*”

## Key Takeaways

- Particularly during a period of rapid growth, a focus on business integrity is critical.
- Conduct pre- and post-acquisition due diligence to identify weaknesses in controls that need to be addressed pre- and post-acquisition.
- Respond promptly and effectively when complaints emerge alleging illegal conduct.
- Identify the root causes of problems when red flags surface to prevent a pattern of corrupt behavior from taking hold.
- Investigations must be robust and thorough, identify the causes and control gaps, and promptly implement appropriate remedial actions.



# LATIN AMERICA



# Latin America: Market Characteristics

## 2021 REGIONAL STATISTICS

**662.5 million**

POPULATION

**8.42%**

OF WORLD'S POPULATION





**31**

MEDIAN AGE

**+ 6.3%**

GDP GROWTH

## LARGEST COUNTRIES

	POPULATION	GDP	CORRUPTION INDEX RANK (out of 180 countries)	COMBAT CORRUPTION RANK (out of 15 LatAm countries)
 BRAZIL	<b>212.6 million</b>	<b>USD 1.45 trillion</b>	<b>94th</b>	<b>6th</b>
 MEXICO	<b>128.9 million</b>	<b>USD 1.07 trillion</b>	<b>124th</b>	<b>11th</b>
 COLOMBIA	<b>50.9 million</b>	<b>USD 271.4 billion</b>	<b>92nd</b>	<b>7th</b>
 ARGENTINA	<b>45.2 million</b>	<b>USD 389.3 billion</b>	<b>78th</b>	<b>5th</b>

# Latin America: Anti-Corruption Efforts Continue to Lose Support

## Corruption Concerns are Prevalent in Latin America

- Per Transparency International's *Corruption Perceptions Index*, more than two-thirds of countries in the region score below 50 out of 100.
- The pandemic increased public sector spending across the region and, as seen with scandals in **Brazil** and **El Salvador**, provided the opportunity for graft and bribery. Efforts to fight such corruption, however, continue to slow from the fervor of the mid-2010s.
- In the *2021 Capacity to Combat Corruption Index*, **Uruguay**, **Chile**, and **Costa Rica** maintained strong anti-corruption scores.
- But the region's two largest economies saw sharp declines.
  - The CCI indicates that Brazil lost ground due to, among other things, the dismantling of the **Lava Jato** investigation and an increase in pork-barrel politics as President Bolsonaro lost political capital.
  - **Mexico** fell from 8<sup>th</sup> in the region to 11<sup>th</sup>. President López Obrador's party has attacked independent institutions and lacked follow-through with anti-corruption initiatives.





# Latin America: Significant Corruption News



## Brazil

### ***Lava Jato – Wind-Down and Implications for 2022 Election***

- Anti-bribery prosecutions in Brazil have slowed down. The *Lava Jato* task force was officially dissolved in February 2021.
- Former President da Silva’s convictions were annulled in March 2021 and he is able to run for president in 2022. da Silva currently leads the polls. Sergio Moro, the judge that convicted da Silva and later served (and resigned) as President Bolsonaro’s justice minister, has declared his candidacy for Brazil’s 2022 presidential elections. He trails both da Silva and Bolsonaro.

### **Additional Corruption Investigations**

- There appears to be a growing trend to conduct investigations through civil and administrative enforcement. Through December 13, 2021, Brazil’s anti-corruption body has filed 204 administrative liability proceedings against corporate entities. The proceedings are aimed towards investigating corruption and fraud in bidding procedures and contracts.
- The Administrative Improbability Law, one of Brazil’s anti-corruption laws, went through a substantial reform this year. In some respects, the amendment weakens some of the anti-corruption provisions in existing law.

# Latin America: Significant Corruption News

## Mexico

- President López Obrador’s flagship anti-corruption referendum did not draw sufficient voter turnout and thus did not become legally binding. If passed, it would have allowed for former government officials (currently immunized from prosecution) to be investigated for past corrupt practices.
- General Cienfuegos, the former defense minister of Mexico, was cleared of all charges of drug-trafficking and corruption by the Mexican government after his release by U.S. law enforcement. The U.S. Justice Department reserved its right to recommence prosecution. U.S. law enforcement had called the evidence against Cienfuegos “overwhelming.”

## Northern Triangle (El Salvador, Guatemala, Honduras)

- On July 1, the U.S. State Department designated persons in the Northern Triangle to the “Engel List,” for having “*knowingly engaged in acts that undermine democratic processes or institutions, engaged in significant corruption, or obstructed investigations into such acts of corruption.*”

## Venezuela

- PDVSA-related prosecutions and guilty pleas continued in the United States, arising from billions of dollars’ worth of fraudulent and corrupt contracts with the state-owned oil and gas giant.

# Latin America: Focused Enforcement Developments from U.S. Authorities

## Department of Justice Anticorruption Task Force for Central America (Guatemala, Honduras, and El Salvador):

- Task Force announced in June 2021:
  - Focus on fighting regional corruption to address root causes of migration. Will consider links to U.S., includes ties to U.S. financial system.
- Task Force has representatives from the following components of the Criminal Division:
  - FCPA Unit of the Fraud Section (i.e., corrupt payments or bribes);
  - Kleptocracy Asset Recovery Initiative of the International Unit of the Money Laundering and Asset Recovery Section (MLARS) (i.e., money laundering);
  - Narcotic and Dangerous Drug Section (NDDS) (i.e., narcotics trafficking, including corruption-enabled issues).
- The Task Force is supported by FBI's International Corruption Unit; the U.S. Drug Enforcement Administration (DEA); and the U.S. Department of Homeland Security (DHS).



# Latin America: Focused Enforcement Developments from U.S. Authorities

## Department of Justice Enforcement Actions

- Former Panamanian Pres. Martinelli's son, ***Ricardo Martinelli Linares***, pleaded guilty in the Eastern District of New York for laundering USD 28 million in a bribery and money laundering scheme involving Odebrecht S.A. (December 2021).
- ***Peter Weinzierl*** and ***Alexander Waldstein***, Austrian citizens, were arrested by U.K. authorities and charged for conspiracy to launder money in a scheme related to Odebrecht S.A. (May 2021).
- ***Alex Nain Saab Moran (Saab)***, a Colombian citizen, was extradited from the Republic of Cabo Verde in connection with a bribery scheme related to Venezuela's government-controlled exchange rate. (October 2021).
- Two Bolivian nationals, one a former Minister of Government and the other a public official, were arrested and accused of receiving bribes from a U.S. company to secure a government military contract worth USD 5.6 million. (May 2021).

The logo for Odebrecht, consisting of the word "ODEBRECHT" in white, uppercase, sans-serif font on a red rectangular background.

# Latin America: 2021 Elections and Anti-Corruption



BRIEFING ROOM

## Statement by President Joseph R. Biden, Jr. on Nicaragua's Sham Elections

NOVEMBER 07, 2021 • STATEMENTS AND RELEASES

White House, November 7, 2021

## Gabriel Boric: From student protest leader to Chile's president

BBC News, December 20, 2021

- Three of the five 2021 presidential campaigns either involved claims of corruption or had corruption play a role in their outcome.
- **Nicaragua's** Daniel Ortego won the election in November, but he did so through the arrest of members of the opposition and threats against the press. This merited a direct rebuke from the Biden Administration. Ortega looks likely to face coordinated international sanctions.
- Pedro Castillo narrowly won the **Peruvian** election. His opponent, Keiko Fujimori, claims election fraud. She, however, is pending trial for receiving over USD 17 million in illegal campaign funds, a topic that factored into the campaign.
- **Chile's** election of Gabriel Boric is considered to be in furtherance of the mass demonstrations against inequality and corruption that took place in 2019 and 2020 and resulted in an attempted impeachment of the previous president.
- In 2022, the **Brazilian** presidential election may become a referendum on anti-corruption efforts past and future— a face-off between President Bolsonaro, ex-President da Silva, and former *Lava Jato* judge Sergio Moro.

# Latin America: Key Trends

## **The Biden Administration has made credible commitments towards fighting corruption in the region.**

- DOJ's public statements and the launch of the new Central America-focused task force reinforce the Administration's focus on the region.

## **FCPA cases in Latin America are slowing – but, in Brazil, the 2022 elections may change the landscape.**

- With the end of the *Lava Jato* taskforce in Brazil and the failure to convict former President and then-Vice-President Kirchner in Argentina, the anti-corruption wave of the mid-2010s appears to be ending.
- While there are ongoing anti-bribery investigations in Brazil, there are fewer prosecutor-driven investigations. The Brazilian elections, scheduled for October 2022, may change that. Polling third, Sergio Moro is campaigning on his popularity as a central figure in *Lava Jato*. *Lava Jato*'s former lead prosecutor, Deltan Dellagnol, is also considering running for nationwide office under Moro's party. If they succeed, they will do so on promises of a reignited fight against corruption.

## **COVID-19 has exacerbated the perception of public officials as corrupt. But the economic and public health problems the pandemic has wrought have distracted from anti-corruption initiatives.**

- Pandemic management has been tainted by line-cutting, graft, and inefficiency.
- Ministers in Peru, Argentina, and Brazil have resigned for giving family and friends preferential treatment for vaccination. Officials in Brazil, El Salvador, Bolivia, and Panama have been accused of inflating the purchase price of vaccines and ventilators for profit.
- Even if there is a greater need for anti-corruption initiatives, few countries made gains in 2021. Uruguay is voting on new campaign financing laws, while Chile has an anti-corruption bill in Congress.



# AFRICA



# Africa: Market Characteristics

**Sub-Saharan Africa accounts for half of projected global population growth in the next three decades.**

**GDP of USD 4.7 trillion (2020).**

**Due to COVID-19, Sub-Saharan African economies contracted by 1.7% in 2020.**

**Growth in 2022 is projected to be 3.8%.**

- 1.7% contraction in 2020 was less severe than initially projected in late 2020 (3.3%).
- As of October 2021, Sub-Saharan Africa's economic growth was estimated to be 3.7%.
- Much of the continent boasts moderate growth, led by the economies of Botswana, Burkina Faso, Cote d'Ivoire, Benin, Kenya, Niger, and South Sudan.
- Still, growth lags behind that of other regions that have experienced explosive growth emerging from the pandemic.
- Vaccination rates in Africa (2.5%) remain the lowest in the world, and, without significant financial and technical assistance from more developed countries, Africa's recovery from the pandemic will remain far behind that of the rest of the world.



# Africa: Impact of COVID-19

Over 9.1 million cases reported.

Over 225,000 deaths.

Per capita GDP across Sub-Saharan Africa reduced by an estimated -5.6%.

An estimated 29 million more Africans will fall into extreme poverty due to Covid-19.

	2020 GDP (USD billion)	GDP Growth	
		2020	2021 (Proj.)
Nigeria	429.4	-1.8%	2.6%
South Africa	335.3	-6.4%	5.0%
Kenya	102.4	-0.3%	5.6%
Ethiopia	96.6	6.1%	1.9%

# Africa: Corruption Climate

## COVID-19 Has Exacerbated Corruption Concerns in Africa

Sub-Saharan Africa remains the lowest-scoring region in the Corruption Perceptions Index.

The South African government revealed rampant corruption by its former Health Minister, including awarding of a USD 10m Covid communications contract to an associate in exchange for kickbacks.

Reports indicate that oversight and anti-corruption requirements in emergency loans to Nigeria, Cameroon, South Africa, and other nations were broadly inadequate.



Without effective oversight, corruption has resulted in:

- *diversion of relief funds*;
- *procurement-related corruption and fraud* in purchasing medical equipment;
- *undue preferential treatment* based on relationships with individuals in power;
- *bribery* for Covid tests, vaccines, treatment, and other health services.

# Africa: Regional Cooperation in Anti-Corruption Efforts

## *Regional Actors Like the African Union and its Advisory Board on Corruption are Maintaining Cooperative Initiatives, Including the African Anti-Corruption Day*

- In a series of events held July 9-12, 2021, in Arusha, Tanzania and broadcast to virtual audiences, the **National Anti-Corruption Authorities (NACAs)**, **Regional Economic Communities (RECs)**, and the **African Union Advisory Board on Corruption (AUABC)** commemorated the 5<sup>th</sup> Edition of the African Anti-Corruption Day, which celebrates the anniversary of the adoption of the African Union Convention on Preventing and Combating Corruption.
  - The Chairman of the Economic and Financial Crimes Commission (EFCC), Abdurashheed Bawa, warned that corruption has “*drastically increased the prevalence of poverty and inequality on our continent,*” and threatens the viability of Africa’s 2063 development vision (called Agenda 2063). Bawa also remarked that the Convention has facilitated remarkable progress in the continent’s efforts to combat corruption.
  - Hajia Hadiza Gamawa, Chief of Staff to the Executive Chairman of the EFCC, offered similar warnings and specifically recommended the full implementation of the African Union Advisory Board on Corruption (AUABC) Strategic Plan, which includes a detailed implementation plan as well as measurement and evaluation indicators.



# Africa: High-Profile Local Enforcement

## Criminal Trials of Several High-profile Government Officials and Entities are Proceeding in Countries Across Africa.

**Namibia:** An investigation which started under *Namibia's Anti-Corruption Commission* has resulted in charges against the state-owned National Fishing Corporation of Namibia, *Fishcor*, and a number of its current and former employees. A wide-ranging indictment charged persons involved with Fishcor with racketeering, conspiracy, fraud, money laundering, tax evasion, and obstruction of justice for allegedly unlawful schemes with Icelandic seafood company *Samherji*. Its former Namibian operations manager, *Johannes Stefansson*, was implicated in the scheme and has since resigned.



**South Africa:** The trial of former South African President *Jacob Zuma* for allegedly accepting bribes related to a 1994 arms purchase spent most of 2021 plagued by delays. The trial was postponed several times to address multiple motions from Zuma, as well as to allow Zuma to find new counsel after his entire legal team quit, seemingly without explanation. In October, Judge Piet Koen dismissed Zuma's application to have prosecutor Billy Downer taken off the case. The dismissal paves the way for the trial to begin on April 11, 2022.



**Malawi:** Malawi's Anti-Corruption Bureau (ACB) arrested a prominent businessman, *Abdul Karim Batatawala*, and a high-ranking immigration official, *Fletcher Nyirenda*, on corruption charges. Batatawala and Nyirenda are accused of awarding Batatawala an irregular government contract that resulted in a loss of USD 5.7 million for the government. Batatawala, who regularly won government contracts, made headlines in 2019 in the leadup to Malawi's abandoned presidential election when he deposited money into the bank account of the then-governing Democratic Progressive Party, for which ex-President Peter Mutharika was the sole signatory. Public pressure forced the party to return the money, but the scandal helped fuel new President Lazaraus Chakwera's high-priority campaign to fight corruption.



# Africa: U.S. Enforcement Actions



ERICSSON

**Djibouti:** A former employee of Swedish telecommunications company *Ericsson* was indicted in September by the DOJ for his alleged role in a conspiracy to launder funds to promote a scheme to pay approximately USD 2.1 million in bribes to high-level government officials in the Republic of Djibouti. *Afework Bereket*, a dual citizen of Ethiopia and Sweden who remains at large, is accused of bribing two high-ranking government officials and a high-level executive at a state-owned telecommunications company to obtain a contract valued at USD 20.3 million.

In December 2019, *Ericsson* entered into a deferred prosecution agreement in connection with a criminal information filed in the Southern District of New York charging the company with conspiracies to violate provisions of the FCPA and will pay fines of over USD 520 million.



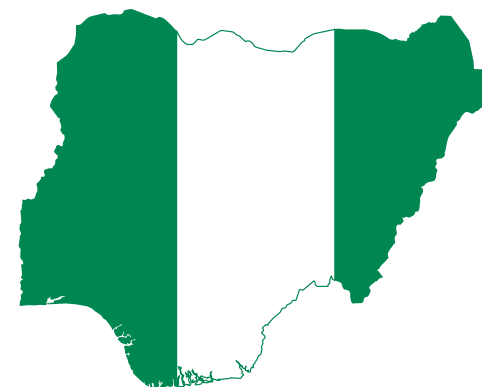
**Egypt:** A Pennsylvania coal mining executive has pleaded guilty to a bribery scheme in Egypt. According to the Department of Justice, executives at *Corsa Coal Corp.*, including *Frederick Cushmore, Jr.*, a former Head of International Sales and Vice-President at the company, conspired with an Egyptian company to bribe local officials for lucrative coal contracts. Corsa Coal said it conducted an internal investigation into the matter after it discovered that an overseas sales agent had been charged with crimes in a foreign jurisdiction. Corsa Coal brought the issue to the Department of Justice and Canadian law enforcement, which continue to investigate the matter.

# Africa: U.S. Enforcement Actions (cont'd)

**Mozambique:** Swiss financial institution *Credit Suisse* has admitted to defrauding U.S. and international investors in the financing of a USD 850 million loan for a tuna fishing project in Mozambique, and agreed to pay approximately USD 475 million in penalties, fines, and disgorgement as part of coordinated resolutions with criminal and civil authorities in the U.S. and UK. The deferred prosecution agreement followed guilty pleas by three Credit Suisse bankers, *Andrew Pearse, Surjan Singh, and Detelina Subeva.*

Mozambique's former finance minister, *Manuel Chang*, faces extradition to the U.S. on corruption charges. Mr. Chang and others stand accused of orchestrating a multinational scheme with bankers at Credit Suisse and Russia's VTB Capital between 2013 and 2015 to sell bond offerings and loans to investors as funding to develop Mozambique's tuna fishing industry. According to investigators, more than USD 200 million was diverted to pay bribes and kickbacks to foreign officials and former bankers.

**Nigeria:** A former trader at a subsidiary of commodities company Glencore, *Anthony Stimler*, pleaded guilty to money laundering and FCPA offenses stemming from work in Nigeria. Between 2007 and 2018, millions of U.S. dollars in bribes were allegedly paid through intermediaries to foreign officials in multiple countries, including Nigeria. In exchange, foreign officials caused the *Nigerian National Petroleum Corp.* to award oil contracts and provide more lucrative grades of oil on more favorable delivery terms.





# Africa: Global Enforcement Actions



**Kenya:** The World Bank debarred a Kenyan management consultancy and advisory company for one year and nine months due to fraudulent practices connected to a project in Somalia. According to the World Bank, the *Africa Development Professional Group Ltd. (ADP)* failed to disclose a conflict-of-interest relationship when submitting a proposal for contract.



**Liberia:** Liberia-based *Crosswords Ltd.* was debarred for six years due to fraudulent and obstructive practices related to a project in Liberia. According to the World Bank, Crosswords submitted forged documents during three bids for two different projects. The company also made false statements and presented false documents to investigators. Crosswords admitted wrongdoing and has agreed to cooperate.



**Yemen:** Yemen-based *Al-Zubairi Group* for General Trading, Contracting, Transportation, and Oil Services was debarred in June 2021 for six months in connection with a fraudulent practice in relation to the Yemen Emergency Electricity Access Project. The debarment makes Al-Zubairi ineligible to participate in projects and operations financed by the World Bank Group. After six months, the debarment converts to a 12-month conditional non-debarment.

# Africa: 2021 Enforcement Trends and Key Lessons

- While Africa initially escaped the full brunt of the Covid-19 pandemic, its economic recovery has been stunted, in part due to corruption hampering relief efforts on the continent.
- High-profile bribery trials of once-untouchable former heads of state may signal a new era in anti-corruption enforcement.
- Non-government international entities such as the World Bank use access to sponsored economic development projects as leverage to enforce anti-corruption policies.
- Enforcement actions by local authorities, the U.S., Canada, and European authorities against companies and individuals reiterate the high risks posed by participation in industries with substantial government involvement, including fishing, energy, infrastructure, and healthcare.
- The United States continues to emphasize anti-corruption enforcement efforts while simultaneously attempting to counteract and compete with China's aggressive approach to economic investment in African nations.



# RUSSIA



# Russia: Market Characteristics



**146 million**

Estimated population of Russia in 2021. Median age 40 years.

**4.3 %**

GDP growth in 2021.

**8.4 %**

Annual inflation in 2021.

**28**

Overall rank in the World Bank's Doing Business Report 2020.

**USD 11.3 billion**

FDI inflows into Russia in Q1-Q2 2021 (four times higher compared to the same period in 2020).

**USD 17.8 billion**

FDI outflows out of Russia in Q1-Q2 2021 (return to pre-pandemic level).

# Russia: Overview of Legislative Developments and Related Headlines

## Russian President Approves the Anti-Corruption Plan for Russia

President Putin approved the *National Plan for Countering Corruption for 2021-2024*. The plan includes a number of proposals, *inter alia*, prohibiting individuals fined for corruption from joining the civil service and implementing training measures to limit corruption.

## State Duma Adopts the Bill on an AML Platform of the Russian Central Bank

- Pursuant to the Bill enacted in December 2021, the Bank of Russia will create a *KYC information service classifying bank clients* – legal entities and individual entrepreneurs – *according to their risk level* (high, medium, low).
- The use of this information by banks will be *voluntary*; they will still make the final decision on determining the client's risk level. However, banks may be *prohibited* from *conducting operations with clients classified as high-risk* by the Bank of Russia.
- The service is planned to launch starting from July 2022.

## Broader Definition of Public Officials

The definition of public officials has been expanded to *include managers of any companies controlled by the state* (as opposed to just “state corporations”).

## Draft bills:

- Proposal to turn monetary funds received by officials for which evidence of the legality of receipt has not been provided into state revenue.
- Proposal that public officials shall not be held liable for non-adherence to anti-corruption preventive measures, if such non-adherence was caused by circumstances beyond their control such as insurmountable force. If adopted, this proposal would render anti-corruption preventive measures practically inapplicable in certain cases.



# Russia: Current Corruption Climate and Related Headlines

## Record Number of Corruption Cases in the First Nine Months of 2021

- Prosecutor General's Office records nearly **30,000 corruption crimes** in the first nine months of 2021, the highest number in eight years.
- Estimated **damage** caused by corruption: **53 billion rubles** (17% increase compared to 2020).



Photo: Sergey Kuksin / rg.ru

## Backlash from the Russian State in the Run-Up to the Parliamentary Elections Held in September 2021

- Alexey Navalny's "Putin's Palace" investigation becomes the most popular video on the Russian internet in 2021 with over 119 million views.
- Navalny imprisoned after returning to Russia, and his Anti-Corruption Foundation (FBK) declared an extremist organization.
- Multiple investigative media outlets declared "foreign agents" or "undesirable organizations."



Photo: Moscow City Court Press Service via ntv.ru

## International Recognition of Efforts of Russian Journalists/Activists Investigating Corruption

- Nobel Peace Prize for *Novaya Gazeta* Editor Dmitry Muratov.
- Sakharov Prize for Freedom of Thought for Alexey Navalny.



Photo: news.un.org



# Russia: Current Corruption Climate and Related Headlines

## Most Significant White-collar Cases in Russia in 2021

### *Corruption at Vostochny Space Center*

Russian court sentenced a further four people to lengthy prison terms after finding them guilty of embezzling 400 million rubles (~USD 5.6 million) during the construction of the country's new Vostochny Cosmodrome in the Far East. This takes the total of individuals that have been sentenced for embezzlement, fraud and abuse of office in connection with the construction of the cosmodrome in recent years to 62.

### *Sberbank Vice President Marina Rakova accused of large-scale embezzlement*

Rakova, Vice-President of Russian state-controlled bank Sberbank and former Deputy Minister of Education of Russia, was accused of embezzling 50 million rubles (~USD 715,000) through state contracts. Media reports note that her arrest came against the backdrop of her initiatives to pursue school digital platforms, potentially clashing with the interests of Russian textbook monopoly Prosveshcheniye, which Sberbank joined as an investor.

### *Arrest of cybersecurity entrepreneur Ilya Sachkov under charges of treason*

Sachkov is the co-founder and CEO of Group-IB, one of the biggest cybersecurity companies in Russia. He was **detained under charges of "state treason"** for reportedly providing the U.S. government with **information about a hacking team in Russia's GRU military intelligence service** and its efforts to influence the 2016 U.S. presidential election.



Photo: Vladislav Larkin



Photo: edu.gov.ru



Photo: Dmitry Astakhov / Sputnik

# Russia: 2021 FCPA Enforcement Actions Involving Russia

## VTB Capital Agrees to Settlement for its Role in Misleading Investors

- In connection with this FCPA case against Credit Suisse (see slide 46 above), a London-based subsidiary of Russian bank **VTB** **separately agreed to pay more than USD 6 million** to settle SEC charges related to its **role in misleading investors in a bond offering**. After learning that a tuna fishing project would not be able to meet repayment obligations under the loan participation notes (“LPNs”), VTB and Credit Suisse structured the exchange offer to allow investors to exchange the prior LPNs for new Mozambique sovereign bonds. The offering materials prepared by VTB failed to disclose the full nature of Mozambique’s debt, the high risk of default of the bond and VTB’s conflict of interest, as the bank was a major creditor under two prior financing arrangements with Mozambican state-owned entities.
- Unlike Credit Suisse, VTB had no knowledge of the bribery scheme behind the tuna fishing project. While therefore not being charged under the FCPA, VTB consented to an SEC order finding that it violated negligence-based antifraud provisions of the federal securities laws.



## Russian Telecoms Company MTS Reports Potential Misconduct

- Russian mobile telecommunications company MTS is currently under a **DOJ monitorship following** a USD 850 million FCPA settlement.
- MTS reportedly identified and disclosed **suspicious transactions relating to its subsidiary in Armenia** to the U.S. authorities.



# Russia: Existing and Possible Future Sanctions

Refinement of existing EU and U.S. sanctions against Russia.

Speculations about disconnecting Russian banks from SWIFT system if Russia invades Ukraine.

EU and U.S. impose sanctions against Belarus, one of Russia's closest allies, over forced landing of a Ryanair flight in Minsk, as well as continued human rights abuses and instrumentalization of migrants.



## Russian Case Law Regarding Sanctions

In its first case applying the “*Lugovoy Law*,” the Russian Supreme Court confirmed the possibility for Russian citizens and companies subject to foreign sanctions to **transfer any dispute with a foreign counterparty to a Russian court**, if the proceedings abroad have not yet been finalized. The decision is predicted to **negatively impact the international contract practice** with Russian companies.

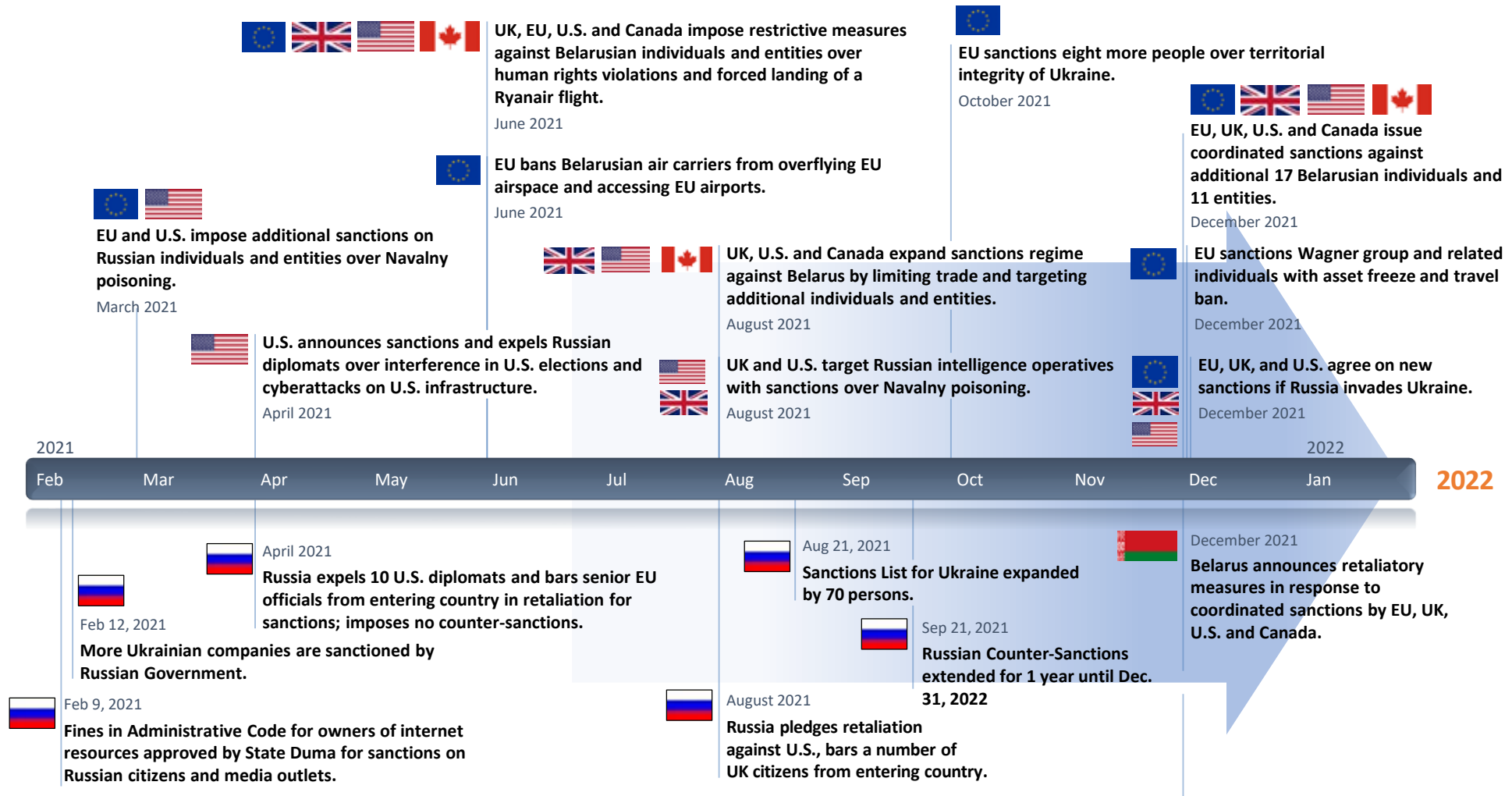
## Russian Bill Adopted

The Russian Government has been given the power to restrict access to financial statements of entities, especially in order to protect companies subject to Western sanctions (Federal Law 435-FZ of December 30, 2021).

## Russian Draft Bill in the Pipeline

Proposal to extend the applicability of individual sanctions for “the violation of rights of Russian citizens,” which can currently be imposed only on U.S. citizens, to any third country nationals or stateless persons.

# Russia: Further Expansion of Sanctions Regimes



Sources: <https://www.state.gov/imposing-sanctions-on-russia-for-the-poisoning-and-imprisonment-of-aleksey-navalny/>; <https://edition.cnn.com/2021/04/14/politics/russia-sanctions-expel-officials-hacking-election/index.html>; <https://www.nytimes.com/2021/04/16/world/europe/russia-expels-diplomats-sanctions.html>; <https://www.politico.eu/article/uk-imposes-fresh-sanctions-on-belarus-one-year-on-from-fraudulent-elections/>; <https://www.themoscowtimes.com/2021/08/10/russia-bars-entry-to-anti-russian-britons-in-response-to-human-rights-corruption-sanctions-a74741>; <https://www.reuters.com/business/energy/russia-pledges-retaliation-after-new-us-sanctions-2021-08-21/>; <https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/history-ukraine-crisis/>; <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-belarus/belarus-timeline/>; <https://www.reuters.com/world/uk/uk-sanctions-seven-russian-intelligence-agents-over-navalny-poisoning-2021-08-20/>; <https://www.consilium.europa.eu/en/press/press-releases/2021/12/13/eu-imposes-restrictive-measures-against-the-wagner-group/>; <https://www.reuters.com/business/aerospace-defense/eu-leaders-consider-new-sanctions-against-russian-surprises-2021-12-16/>; <https://www.europeansanctions.com/2021/12/belarus-announces-sanctions-countermeasures/>; <https://rg.ru/2021/09/20/putin-prodlil-na-2022-god-dejstvie-kontrsanckij.html>; <https://rg.ru/2021/08/21/rossiya-vvela-sankcii-protiv-glavy-mid-ukrainy-i-sekretaria-snbo.html>; <https://rg.ru/2021/02/09/gosduma-podderzhala-shtrafy-dlia-it-resursovo-za-sankcii-protiv-rossijskih-smi.html>; <https://rg.ru/2021/02/12/mishustin-rasshiril-otvetnye-sankcii-protiv-kompanij-ukrainy.html>



# Russia: Special Focus – Cybercrime and Cryptocurrency-Related Crime

## Rising Cybercrime Attacks Originating From Russia or Eastern Europe

- Moscow’s tallest tower is reported to have become a cybercriminal cash machine, with numerous companies offering services converting cryptocurrencies to cash without any KYC checks.
- Criminal hacker groups made USD 590 million from ransomware attacks in 2021 – 42% more than they did in 2020.



## Reactions From Russian Authorities

- The Russian Digital Assets Act came into force on January 1, 2021. It recognizes cryptocurrencies, but prohibits their use to pay for goods and services.
- The Russian Prosecutor General’s Office has prepared a draft bill to recognize cryptocurrency as property under the Criminal Code of Russia.

## U.S. Criminal Enforcement Related to Cybercrimes by Russian Groups or Nationals

- In June 2021, the **DOJ seized 63.7 Bitcoins** valued at approximately USD 2.3 million. These funds allegedly represent the proceeds of a May 2021 **ransom payment to a group known as DarkSide**, which had targeted *Colonial Pipeline*, the largest pipeline system for refined oil products in the U.S., resulting in **critical infrastructure being taken out of operation**. DarkSide is based in Eastern Europe, likely Russia.
- In April 2021, **Roman Sterlingov**, a dual Russian-Swedish national, was arrested in the U.S. on criminal charges related to a **Bitcoin money laundering service on the Darknet**. Sterlingov was charged with **money laundering**, operating an **unlicensed money transmitting business**, and **money transmission without a license** in the District of Columbia.
- In December 2021, **Aleksandr Grichishkin**, a Russian national, was sentenced to 60 months in prison in the U.S. for **providing “bulletproof hosting” services**, which were used by cybercriminals between 2009 to 2015, to **distribute malware and attack financial institutions** and victims throughout the United States.

# Russia: Key Takeaways

- Whereas the **record number** of prosecuted corruption cases in Russia may signal the increased willingness of Russian enforcement authorities to combat corruption, over the past year the Russian state effectively **suppressed the efforts of local anti-corruption activists and investigative media outlets** to discover and report potential corrupt acts related to members of the political elite.
- White-collar enforcement in Russia remains controversial, with high-profile cases facing the criticism of being a **power struggle** between political and economic groups. The increasing risk of actions brought under **charges of “state treason”** may impact the involvement of Russian IT companies in the disclosure and transmission of data.
- The broad use of **sanctions and counter-sanctions** continues to add a further layer of complexity, with the ongoing speculations about ever more severe international sanctions contributing to overall instability. **Sanctions and export control enforcement** constitutes one of the main trends in white-collar prosecution, especially in the U.S.. Companies with significant Russia exposure need to **keep a close track of latest developments** in order to mitigate the risk of significant penalties.
- Russian groups and individuals are also at the heart of another U.S. enforcement trend related to cybercrime and cryptocurrency-related crime. With this topic being potentially intertwined with numerous areas including **corruption, money laundering, or bypassing sanctions regimes**, companies especially in the financial sector need to **be aware of the risks, vigorously implement KYC and AML requirements and monitor developments** in this area.



# GLOBAL TRENDS AND RISK MITIGATION STRATEGIES



# Trend: Growing Focus on the “Demand” Side of Corruption

## 2021 OECD Anti-Bribery Recommendation

- On November 26, 2021, the OECD adopted a revised Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the “Recommendation”).
- Although the OECD has traditionally focused on “bribe-givers,” the Recommendation includes a new section addressing the *demand side of foreign bribery cases* i.e., those soliciting and receiving bribes.
- Key recommendations for OECD member countries include:
  - *Raising awareness of bribe solicitation risks* among public officials and the private sector, paying particular attention to high-risk geographies.
  - *Training public officials posted abroad* on information and steps to be taken to assist enterprises confronted with bribe solicitation.

## Biden Administration’s New Anti-Corruption Strategy

- On December 6, 2021, the Biden administration announced a new anti-corruption strategy, which includes the U.S. Government working with allies and partners on “*enacting legislation criminalizing the demand side of bribery.*”
- Historically, the SEC and DOJ have prosecuted bribe-givers under the FCPA and used AML statutes to pursue bribe recipients.

## Key Takeaways

- OECD and U.S. developments signal a more holistic approach to tackling anti-corruption, whereby authorities address *demand side as well as supply side bribery*.
- Chinese authorities have traditionally focused on bribe recipients. Recent legislative developments in China mean that moving forward *both the bribe-giver and bribe-receiver will be the subject of Chinese anti-corruption investigations*.
- We can expect to continue to see the expansion of anti-corruption legislation globally to tackle both demand and supply side bribery.

# Trend: Increased Preference for Non-Trial Resolutions in Corruption Cases

## 2021 OECD Anti-Bribery Recommendation

- Recommends that member countries *consider using a range of methods to resolve anti-bribery cases, including non-trial resolutions* and mechanisms to resolve matters without a full court or administrative proceeding, based on a negotiated agreement such as a DPA.
- OECD member countries should ensure that non-trial resolution of foreign bribery cases does not constitute an obstacle to effective investigation and prosecution in other countries and *allows for effective international cooperation*.

## Key Takeaways

- We can expect to see more countries develop non-trial mechanisms for resolving foreign bribery matters and other crimes.
- Increased use of non-trial resolutions globally will likely lead to (1) increased cooperation between enforcement authorities; and (2) a rise in global settlements for corruption matters.

## Recent Examples of Countries Using Non-Trial Resolutions for Corruption Cases

- **Brazil:** In February 2021, Samsung Heavy Industries agreed to pay USD 148.56 million in a leniency deal with Brazilian authorities pursuant to Brazil's Anticorruption Leniency Program to settle alleged corruption allegations over contracts with state-owned oil maker, Petroleo Brasileiro SA.
- **China:** China launched its Pilot Program for Corporate Criminal Compliance in 2020, which it recently expanded in 2021. Bribery constitutes a "typical" case under the Pilot Program.
- **Japan:** In May 2016, Japan amended its Criminal Procedure Code to allow prosecutors to enter into an agreement with a cooperating suspect or criminal defendant to drop or reduce charges or to agree to a pre-determined penalty. In May 2021, the Japanese Ministry of Economy, Trade and Industry published guidelines recommending that this "agreement system" be considered in cases where a foreign public official demands bribes or where internal audit or reporting identifies potential bribe payments to a foreign public official.

# Mitigation: Establish an Effective Corporate Compliance Program

*A company's compliance program should be based on the results of a risk assessment and should be "periodically updated" and revised based on lessons learned.*

*Policies and procedures should be memorialized in written compliance manuals, and periodic training should be rolled out and tailored to the audience.*

*Companies should ensure sufficient oversight of third-parties and those with primary responsibility for communicating with third parties.*

***Insufficient oversight of third parties and failure to respond to red flags are key sources of risk.***



*The tone from the top should emphasize a "culture of compliance." There should be strong support and rigorous adherence to compliance policies from those in management roles.*

*Adequate procedures should be in place to identify and respond to red flags.*

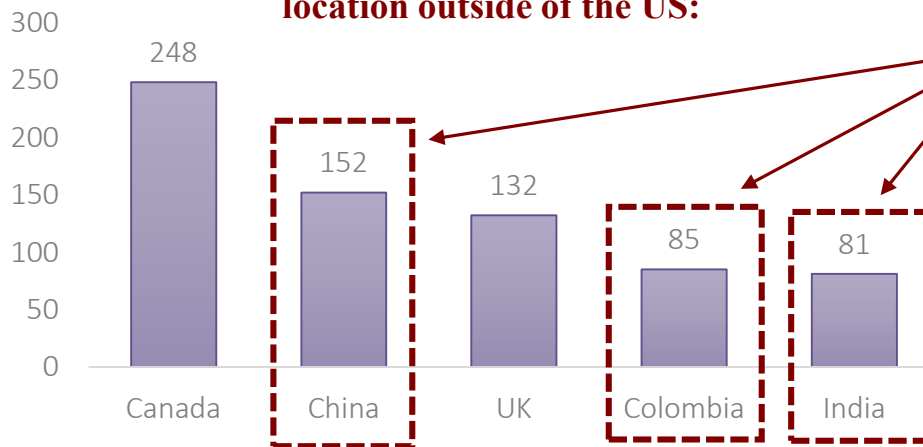
*Companies should ensure that employees understand the risks involved with soliciting or receiving bribe payments, and that they understand the chain of escalation when confronted with bribe solicitation.*

# Trend: Increasing Whistleblower Activity and Protections for Whistleblowers

## SEC Annual Report to Congress on the Whistleblower Program 2021

- Whistleblower tips related to the FCPA **increased by 24%** in fiscal year 2021. The SEC received **258 FCPA tips** – the most it has received in a single year. Notably, it also made more whistleblower awards in FY 2021 than in all prior years combined.

### Highest number of whistleblower tips by geographic location outside of the US:



Emerging markets account for **three of five** of the top countries outside of the U.S.

In August 2021, the SEC awarded **three compliance officers** a joint whistleblower award of **more than USD 1 million.**

## 2021 EU Directive on Whistleblower Protection

- The Directive establishes uniform minimum protections for whistleblowers against retaliation from employers when reporting breaches of EU law. Notably, EU companies and public bodies with 50 or more employees must implement an internal reporting system.
- Companies with operations within the EU must ensure that they comply with the implementing laws of the Member States in which they operate.

## 2021 OECD Recommendation on Whistleblower Protection

- In its 2021 Anti-Bribery Recommendation, the OECD included **new provisions to protect whistleblowers** and incentivize compliance.
- The OECD recommends that government agencies consider “*internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits.*”

# 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

- Review compliance and 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, including *foreign 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 a 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, China, Canada, and the EU* have implemented or considered implementing new whistleblower protection laws.

The SEC has made clear that the fact that a whistleblower is a foreign national is not a barrier to receiving an award. The SEC has awarded USD 30 million to a foreign whistleblower who provided the SEC with key, original information about an ongoing fraud.



# Trend: Recent Enforcement Actions Highlight Internal Audit Findings

**Recent FCPA enforcement actions highlight the importance of internal audits and the need to address issues uncovered by auditors**



***Credit Suisse:*** The SEC highlighted internal audit findings about operating losses at a Mozambique state-owned entity for which Credit Suisse provided financing and bond offerings. DOJ stated that, as part of its settlement, Credit Suisse agreed to enhance its compliance program and internal controls to address red flags about corruption and improper use of loan proceeds.



***WPP:*** The SEC described internal audits that indicated insufficient compliance governance at WPP after a series of acquisitions of small, local advertising agencies in high-risk markets. WPP allegedly failed to respond to internal audits in 2017 that showed that a Chinese subsidiary was employing tax avoidance schemes. WPP agreed to pay USD 19 million in disgorgement and civil penalties and to enhance its internal audit functions as a result of the action.



***Deutsche Bank:*** The SEC alleged that Deutsche Bank senior management did not take sufficient action after a 2009 internal audit report identified concerns with the bank's use of business development consultants in the Asia-Pacific region. Deutsche Bank agreed to pay approximately USD 35 million in disgorgement to the SEC.

# Mitigation: Collaboration Between Internal Audit, Legal, and Compliance Functions

## **Consider whether audits should be conducted with legal oversight when sensitive topics are at issue**

- Involve the legal department if an audit addresses compliance with the law.
  - Implement a policy with defined escalation steps, particularly where involving indicia of fraud, corruption, or other legal violations.
  - Include compliance- and corruption-related areas in your company's regular audit rhythm.

## **Consider implementing best practices for a working relationship between internal audit, Legal, and Compliance teams**

- Confirm Legal's direction and the scope of the review in a formal communication.
- Keep audit issue summaries and reports strictly factual. Avoid conclusions, especially when referring the matter to another group, i.e. Compliance.
- Use precise wording in audit reports.
  - Avoid sweeping or overly broad statements. Words on legal exposure, risk, and liability can be taken out of context.
  - Be clear about if or whether findings are limited.
- Label documents appropriately. When a document contains information that is confidential, proprietary, or privileged, mark it as such. Documents not in final form should be labeled as drafts.
- Ensure that remedial steps are practical and workable, and that there is a process to follow on any action items.

# 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, the DOJ, and local enforcement agencies. High-risk third parties may include:**

**China:** Sales Agents, Clinical Research Organizations, Sham Service Providers, Consultants for Government Subsidies, PR/Marketing Firms, Travel Agents, or Distributors.

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

**Russia:** Distributors, State-Owned Customers, Fictitious Service Providers, Vendors, or Private Customers.

**Latin America:** Sales and Marketing Agents, Local Counsel, Customs Brokers, Lobbyists, or Tendering Agents.

**Africa:** Business Development and Marketing Agents.

## **Amec Foster Wheeler Used Third-Party Agents to Make Improper Payments**

- Between 2011 and 2014, Amec Foster Wheeler worked with an Italian sales agent affiliated with a Monaco-based intermediary to make payments to decision-makers at Brazil's Petrobras in exchange for a contract.
- The SEC noted that none of the improper payments were accurately reflected in Amec Foster Wheeler's books and records, and it did not have sufficient internal accounting controls in place to detect or prevent the misconduct.
- In June 2021, Amec Foster Wheeler entered into a three-year DPA with the DOJ and agreed to pay over USD 18 million to resolve charges related to the conduct in Brazil.
- The DOJ noted that the case should serve as a warning to companies: *using a third-party intermediary to pay bribes will not preclude them from being held responsible for corruption.*

# Mitigation: Carefully Monitor High-Risk Third Parties

**Use of third parties is 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 using agents and intermediaries.**

## BEST PRACTICES

- Identify the specific functions that are *prone to corruption* which are handled by third parties.
- Involve *Legal and Compliance* in contract negotiations/drafting to ensure that services are specifically and accurately described, and ensure that an efficient control (e.g., Finance) can assess whether the services have actually been rendered and whether prices are reasonable in light of those services and 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 the *interaction* in emerging markets between sales force, 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.

# APPENDIX: THE FCPA



# 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 a 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).*



# Upcoming Programs & Resources

## Upcoming Programs

- FCPA 2021 Year-End Update on February 1, 2022 (to register, [Click Here](#));
- Navigating the Minefield of Dodd-Frank's Whistleblower Provisions (2021 Update) on January 18, 2022 (to register, [Click Here](#)); and
- Bank Secrecy Act/Anti-Money Laundering and Sanctions Enforcement and Compliance on January 19, 2020 (to register, [Click Here](#))

## Resources

- [Gibson Dunn FCPA Practice Group](#)

# Our Offices

## Beijing

Unit 1301, Tower 1  
China Central Place  
No. 81 Jianguo Road  
Chaoyang District  
Beijing 100025, P.R.C.  
+86 10 6502 8500

## Brussels

Avenue Louise 480  
1050 Brussels  
Belgium  
+32 (0)2 554 70 00

## Century City

2029 Century Park East  
Los Angeles, CA 90067-3026  
+1 310.552.8500

## Dallas

2001 Ross Avenue  
Suite 2100  
Dallas, TX 75201-6912  
+1 214.698.3100

## Denver

1801 California Street  
Suite 4200  
Denver, CO 80202-2642  
+1 303.298.5700

## Dubai

Building 5, Level 4  
Dubai International Finance Centre  
P.O. Box 506654  
Dubai, United Arab Emirates  
+971 (0)4 318 4600

## Frankfurt

TaunusTurm  
Taunustor 1  
60310 Frankfurt  
Germany  
+49 69 247 411 500

## Hong Kong

32/F Gloucester Tower, The Landmark  
15 Queen's Road Central  
Hong Kong  
+852 2214 3700

## Houston

811 Main Street, Suite 3000  
Houston, Texas 77002-6117  
+1 346.718.6600

## London

Telephone House  
2-4 Temple Avenue  
London EC4Y 0HB  
England  
+44 (0) 20 7071 4000

## Los Angeles

333 South Grand Avenue  
Los Angeles, CA 90071-3197  
+1 213.229.7000

## Munich

Hofgarten Palais  
Marstallstrasse 11  
80539 Munich  
Germany  
+49 89 189 33-0

## New York

200 Park Avenue  
New York, NY 10166-0193  
+1 212.351.4000

## Orange County

3161 Michelson Drive  
Irvine, CA 92612-4412  
+1 949.451.3800

## Palo Alto

1881 Page Mill Road  
Palo Alto, CA 94304-1125  
+1 650.849.5300

## Paris

16, avenue Matignon  
75008 Paris  
France  
+33 (0)1 56 43 13 00

## San Francisco

555 Mission Street  
San Francisco, CA 94105-0921  
+1 415.393.8200

## São Paulo

Rua Funchal, 418, 35º andar  
Sao Paulo 04551-060  
Brazil  
+55 (11)3521.7160

## Singapore

One Raffles Quay  
Level #37-01, North Tower  
Singapore 048583  
+65.6507.3600

## Washington, D.C.

1050 Connecticut Avenue, N.W.  
Washington, D.C. 20036-5306  
+1 202.955.8500