

PROTECTING YOUR COMPANY FROM CRIMINAL and CIVIL LIABILITY UNDER the FCPA

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FCPA Overview

- Enacted in 1977 to halt the practice of bribing foreign officials
- Two main provisions:



Jointly enforced by the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC)

US FCPA – important concepts



"Anything of Value"



"Foreign Official"



"Obtain or Retain Business"



"Directly or Indirectly"

Top 10 FCPA settlements – two record settlements in 2020

1 ▶ Goldman Sachs Group Inc. (United States): \$3.3 billion in 2020

2 ▶ Airbus SE (Netherlands/France): \$2.09 billion in 2020

3 ▶ Petrobras (Brazil): \$1.78 billion in 2018

4 ▶ Telefonaktiebolaget LM Ericsson (Sweden): \$1.06 billion in 2019

5 ▶ Telia Company AB (Sweden): \$965 million in 2017

6 ▶ MTS (Russia): \$850 million in 2019

7 ▶ Siemens (Germany): \$800 million in 2008

8 ▶ VimpelCom (Holland) \$795 million in 2016

9 ▶ Alstom (France): \$772 million in 2014

10 ▶ Société Générale (France): \$585 million in 2018

Identifying risk areas*



Country
(See Corruption
Perceptions Index)



Third parties



Gifts and
promotional
expenses



Travel



Entertainment



Political
contributions

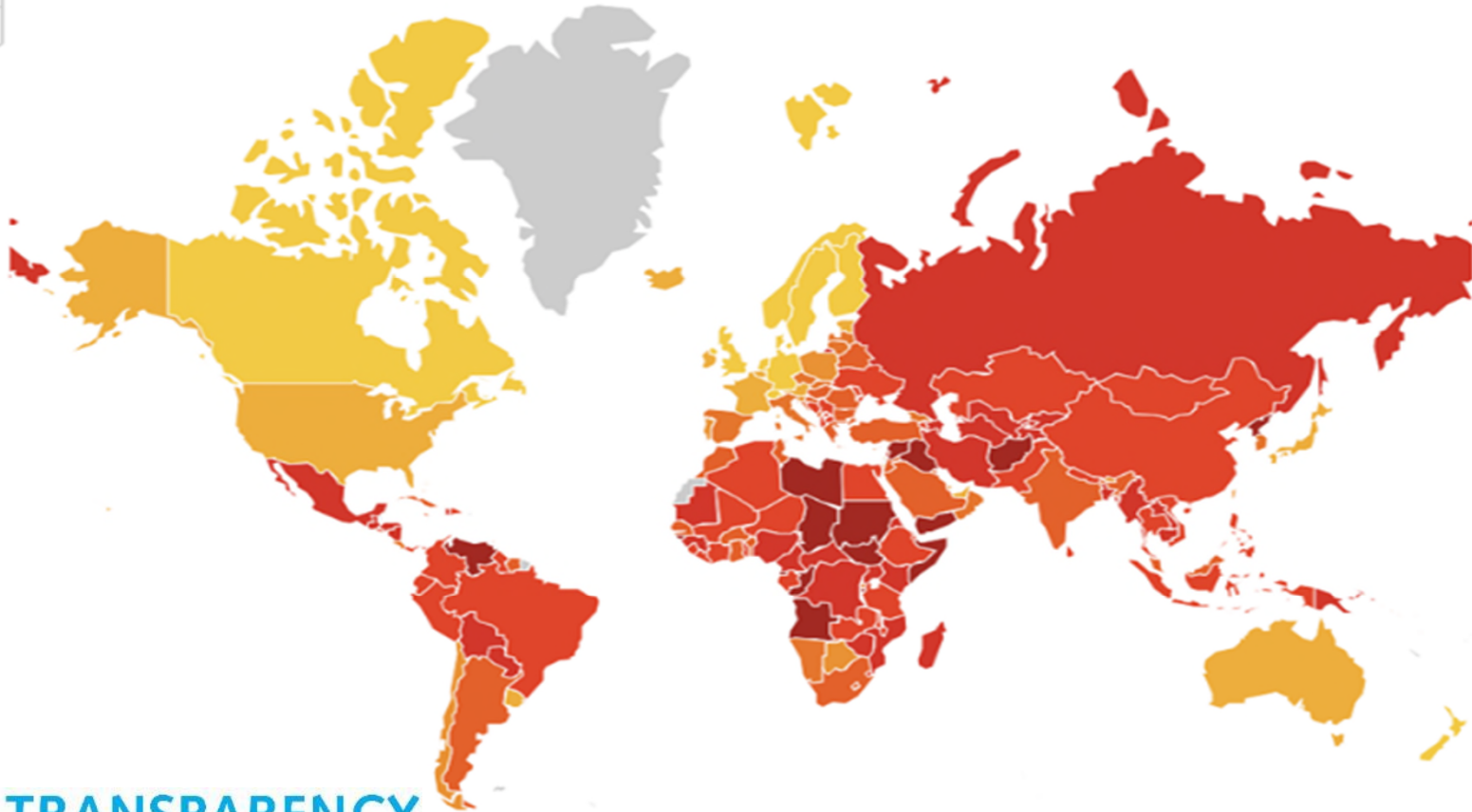


Charitable
contributions



Petty cash

Transparency International Corruption Perceptions Index (CPI) 2020



Risk areas: third parties

- Third parties that provide services to or act on behalf of your company can subject your company to liability for their violations of anti-corruption laws
 - Even if your company did not direct them to violate the law
 - Even if your company did not have actual knowledge of the third party's intent to violate the law
 - Your company can be liable for the actions of third parties if the company had knowledge of, or "consciously avoids" knowing, or is "willfully blind" to potentially corrupt conduct of the third party
- Examples of third parties that can create FCPA risks:
 - Sales representatives/agents, consultants, distributors, resellers
 - Customs brokers who assist your company with customs clearance
 - Freight forwarders and logistics providers
 - Tax consultants who interact with governmental tax and revenue authorities
 - Political lobbyists who interact with legislative or ministerial authorities
 - Building consultants / surveyors
 - Transporters / haulage companies who interact with government officials

Risk areas: third parties

- Red flags
 - Cash payments to third parties
 - Unusually large commissions to agents or usually large discounts to distributors
 - Payments to agents who use shell companies or to offshore accounts
 - Undocumented payments, or payments for work that cannot be substantiated
 - Consulting agreements with only vaguely described services
 - Payments made to agents in locations other than where the work was performed
 - Large payments to third parties for preparing and/or translating tender documents
 - Third parties recommended or requested by foreign government officials
 - Third parties related to or closely associated with a foreign official
 - The agent or consultant is in a different line of business than that for which it has been retained or has no relevant experience or capability
- Suggested requirements for engaging third parties
 - Review of proposed third parties and due diligence, including use of free internet search engines, such as Google
 - Background checks performed on high-risk service providers
 - Compliance requirements and certification for third parties

Compliance evaluation metrics

- Metrics by which DOJ evaluates companies' compliance programs in criminal matters

1

Do directors and managers offer strong support for corporate compliance policies?

2

Do compliance personnel have stature in the company? And do the compliance teams get the resources they need?

3

Are compliance policies based on a risk assessment? Are they easily understood and translated?

4

Are compliance policies effectively communicated to employees? Are they easy to find and do employees get repeated training?

5

Are compliance policies updated?

6

Are there ways to enforce compliance policies and is compliance incentivized and violators disciplined?

7

Are third parties informed of compliance expectations?

FCPA Resource Guide:

Hallmarks of Effective Compliance Programs:

- 1 Commitment from Senior Management and a Clearly Articulated Policy Against Corruption
- 2 Code of Conduct and Compliance Policies and Procedures
- 3 Oversight, Autonomy, and Resources
- 4 Risk Assessment
- 5 Training and Continuing Advice
- 6 Incentives and Disciplinary Measures
- 7 Third Party Due Diligence and Payments
- 8 Confidential Reporting and Internal Investigation
- 9 Continuous Improvement: Periodic Testing and Review
- 10 Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration

Enforcement trends: focus on individuals

- The US DOJ's "Yates Memo" was authored by Deputy Attorney General Sally Yates and issued September 9, 2015
- The Memo indicated that the DOJ would significantly increase enforcement against the individuals who perpetrate corporate misconduct
 - 2019 update on disclosure regarding individuals: requires companies to disclose facts **"as to any individuals" who played a substantial part in the "misconduct at issue"**
- 2019 featured one of the highest number of FCPA prosecutions against individuals since the law was enacted
 - In 2020, six individuals were sentenced, six individuals were indicted and seven pleaded guilty

- Issuance of a criminal indictment could lead the company's auditors to refuse to certify the company's financial statements
 - The inability to obtain certified financial statements can trigger breaches of representations under loan covenants
- Private actions / civil lawsuits by competitors and customers injured by the unlawful conduct can result in additional damages
- Authorities of the country where the company is located and other implicated countries may file charges
- Investigations can be extremely expensive and result in a considerable misallocation of time and resources
- The SEC and DOJ may require that an independent monitor be retained at company expense to ensure continued compliance with the FCPA (although none were imposed in 2020)
- The company's reputation can be irreparably damaged, leading to loss of business and higher costs of capital



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Thank you!

If you have any questions, please do not hesitate to reach out.

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Thank you for the opportunity
to provide you with this information!