CliftonLarsonAllen

International Anti-bribery and Corruption Compliance

Bribery and corruption take place to one degree or another in virtually every country in the world. The *Foreign Corrupt Practices Act* (FCPA) was enacted in 1977 to combat corruption involving U.S.-based entities as well as foreign entities doing business in the United States. In recent years, government investigators have become more aggressive in their efforts to expose and prosecute corrupt practices at all levels.

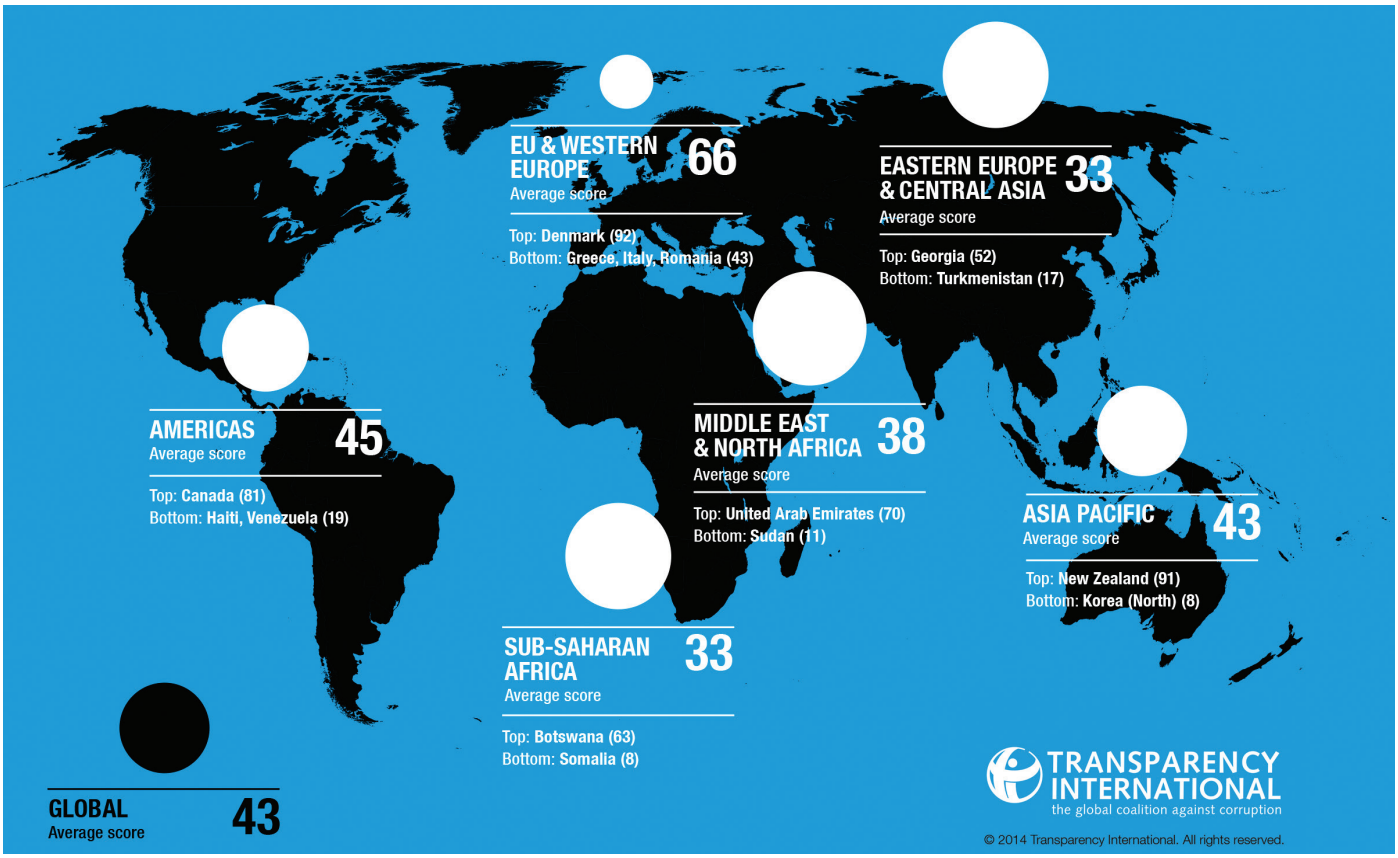
This document is an overview of global corruption: Where corruption exists, where anti-corruption compliance is going, and what a business owner, executive, or employee can do to reduce the risk of bribery and corruption in their organization.

Overview of world corruption

In its 2014 Corruption Perceptions Index (CPI), issued on December 1, 2014, Transparency International (www.transparency.org) reports that more than two-thirds of the 175 countries in its index score below 50 on a scale of 0 to 100, where 100 represents governments and public sector practices that are perceived to be the "cleanest," and 0 represents those that are perceived to be the most corrupt.

While the United States sees itself as an example and a leader in the fight against corruption around the world, it is currently tied for number 17 out of 175 on the CPI, with a score of 74. Denmark and New Zealand are the top two countries in the CPI, with scores of 92 and 91 respectively. North Korea and Somalia are at the bottom of the list, with a score of 8.

In 2005, the Department of Justice and the Securities and Exchange Commission imposed more than $30 million in fines and penalties in corruption cases. By 2010, the total rose to almost $1.8 billion.



Corruption can only be quantitatively measured when illegal activities come to light through investigations and prosecutions. However, the level of prosecutions may reflect only a part of the actual activity. The CPI is a method for comparing the perceived levels of public sector corruption by those in positions to offer insight on the level of activity. It is an aggregate indicator based on multiple data sources from independent institutions specializing in governance and business climate analysis. The CPI has become a useful tool for those working to combat bribery and corruption across the globe.

Anti-corruption efforts in the United States

The FCPA arose from federal investigations in the mid-1970s that resulted in hundreds of U.S. companies admitting to making millions of dollars in questionable or illegal payments to foreign government officials. Originally enacted in 1977 and amended in 1998, the FCPA prohibits illegal payments to foreign officials in order to obtain or retain business.

The Department of Justice (DOJ) is responsible for criminal and civil enforcement of the FCPA's anti-bribery provisions. The Securities and Exchange Commission (SEC) is responsible for civil enforcement of the accounting provisions of the law among publicly traded companies and those required to make SEC reports. The DOJ and SEC act together in parallel proceedings to pursue individuals and companies for violations of the FCPA.

Prosecutions under the FCPA were rare a decade ago, but there has been a dramatic increase in the number of cases against corporations and individuals. The highest fine imposedon a single corporation was in 2008, when Siemens was ordered to pay an $800 million penalty. In 2011, a $148.9 million fine was imposed on an individual. Excluding the highs and lows in recent years, the average penalty is between $3 million and $33 million according to *Recent Trends and Patterns in FCPA Enforcement* from Sherman & Sterling LLP (2012).

The *Foreign Corrupt Practices* Act

The FCPA contains two types of provisions:

- Anti-bribery provision makes it a federal crime for an individual, business entity, or employee of an entity, to offer or provide, either directly or through a third party, anything of value to a foreign official with the intent to influence the award or continuation of business, or to gain an unfair advantage.
- Accounting provisions make it illegal for a public company to have false or inaccurate books or records, or to fail to maintain internal controls to prevent or detect corrupt practices.

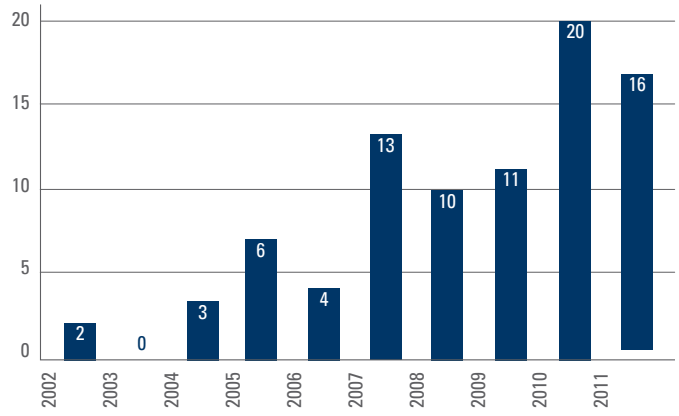
Anti-bribery provisions

Under the FCPA, it is unlawful to bribe or offer to bribe foreign officials to obtain or retain business. The law has a sweeping reach, applying the same standards to any individual, firm, officer, director, employee, or agent of an entity, as well as any stockholder acting on behalf of the entity. It applies to both public and private entities.

Regulators have indicated that they will be aggressive in asserting jurisdiction in alleged corruption cases involving:

- Individuals: This includes any U.S. citizen, national, or resident of the United States, regardless of where in the world the alleged illegal conduct occurs.
- Corporations: This can be any corporation that has issued securities registered with the SEC.
- A domestic concern: Any corporation, business, or entity is covered if it has its principal place of business in the United States, or is organized under U.S. state laws.
- A foreign national or business: Territorial jurisdiction can include foreign companies and foreign individuals who themselves, or through third parties, act to cause or allow a corrupt payment to take place within U.S. borders.
- U.S. parent companies: The U.S. parent of a foreign subsidiary can be charged if it has authorized, directed, or controlled activity that violates the FCPA.

Total Aggregated Corporate Cases: 2002 – 2010



SOURCE: *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act,* January 2012, Shearman & Sterling LLP

Determining if an FCPA violation has occurred can be tricky. Investigators attempt to gather evidence of the actions of individuals through interviews with witnesses and participants, a review of relevant documents (including emails) related to the transaction, and through forensic analysis of financial records.

Intermediaries, such as agents, subcontractors, or other third parties, do not shield an individual or entity making, or attempting to make, a corrupt payment. Under the FCPA, it is unlawful to make or offer a payment to a third party, knowing that all or part of the payment will go directly or indirectly to a foreign official. "Knowing" may include conscious disregard or deliberate ignorance regarding the purpose of the payment.

Accounting provisions

The accounting provisions of the FCPA apply to SEC registrants and nonregistrant entities that must file reports with the SEC.

Accurate books and records — Under this provision, an entity must keep books, records, and accounts with reasonable detail, and to accurately reflect the true nature of transactions and the disposition of the assets of a company. An entity could be liable if a transaction such as a bribe, illegal commission, or improper payment, is disguised, mislabeled, or manipulated to conceal the true nature of the payment.

Internal controls — The accounting provisions also mandate a system of internal accounting controls to:

- Provide assurance that transactions are executed with management knowledge and authorization.
- Ensure that assets are properly recorded, as necessary to permit preparation of financial statements and to maintain accountability for assets.
- Limit access to assets to those specifically authorized by management.
- Make certain that recorded assets are periodically compared with existing assets, and that appropriate action is taken on any differences.

U.S. parent companies may be held liable for false or fraudulent entries on any books or records of foreign subsidiaries that are ultimately consolidated with the parent company's books and records for financial reporting purposes.

In many instances, finding conduct in violation of the anti-bribery provision also results in books and records charges since improper payments are often falsely characterized in a company's accounts as "commissions," "entertainment," or "miscellaneous expenses." The SEC may also take the position that the improper payments would not have been made if the company had effective internal controls. Furthermore, violations under the accounting provisions can be found even if anti-bribery violations are not.

Sanctions and penalties

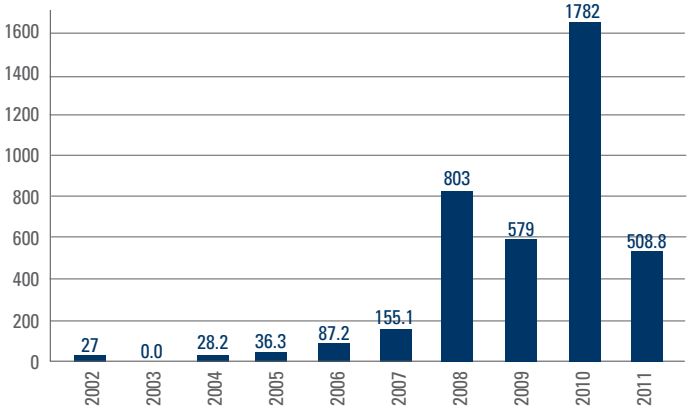
FCPA violations can result in civil and criminal actions, including significant fines and penalties for corporations and individuals.

Criminal fines of up to $2 million *per incident* can be "stacked" and imposed on corporations and other businesses for violations of the anti-bribery provision. Under the *Alternative Fines Act*, fines can be up to twice the intended financial gain or loss the defendant sought by making or promising to make the corrupt payment.

Individuals, including officers, directors, stockholders, employees, and agents can be fined up to $100,000 *per incident*, and imprisoned for up to five years for criminal anti-bribery violations. Under the *Alternative Fines Act*, these fines may be as much as $250,000 per anti-bribery violation or twice the intended financial gain or loss the defendant sought by making or promising to make the corrupt payment. Fines imposed on an individual may not be paid by their employer.

Criminal fines for violations of the accounting provisions of the FCPA can result in companies paying up to $25 million, and individuals paying up to $5 million and serving 20 years in prison.

Total Criminal and Civil Fines Imposed on Corporations: 2002 – 2011



SOURCE: *FCPA Digest: Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act,* January 2012, Shearman & Sterling LLP

In addition, civil fines of up to $10,000 per violation may be imposed by the U.S. Attorney General or the SEC. Other remedies available include:

- Suspension and debarment from doing business with the government
- Loss of export licenses

The most significant penalty for a company may be the disgorgement of ill-gotten profits. It is likely that the profit calculation will be significantly more than the fines noted above. For investigations and settlement discussions — which can last for years — the prejudgment interest calculation can also be substantial.

According to *Recent Trends and Patterns in FCPA Enforcement* from Sherman & Sterling LLP (2012), the DOJ and SEC imposed more than $30 million in fines and penalties in FCPA cases in 2005. In 2008, more than $800 million in fines and penalties were imposed. By 2010, the total rose to almost $1.8 billion. These fines and penalties are in addition to sanctions such as termination of government licenses and debarment from government contracting. In several cases, enforcement agencies have sought to require a company to appoint an independent FCPA compliance officer to continuously monitor the company's business dealings.

The *Dodd-Frank Wall Street Reform Act of 2010* expanded the FCPA's already strong whistleblower provisions. It provides a financial reward for an FCPA whistleblower amounting to 10 – 30 percent of the penalty amount if penalties total more than $1 million. The Foreign Corrupt Practices Act Reporting Center (www.foreign-corrupt-practices-act.org or 1-800-934-2921) is a clearinghouse for public claims of wrongdoing.

Once a matter is settled with regulators, it still may not be over for the entity. Many companies then face a significant risk of shareholder and/or derivative actions as a result of the underlying conduct, the disclosures related to that conduct, or how the investigation and misconduct was remediated.

International anti-bribery efforts

Worldwide intolerance of corruption has been on the rise for more than a decade. The Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) is one well-known tool in the fight against international corruption. Thirty-eight countries, including four nonmember countries, are parties to the OECD Anti-Bribery Convention, and have adopted the 2009 Anti-Bribery Recommendations. These recommendations are intended to strengthen the OECD framework for combating bribery by:

- Adopting best practices to make companies liable for foreign bribery, and to prevent companies from being misused as vehicles for bribing foreign public officials.

U.K. Bribery Act of 2010

The United Kingdom has taken an aggressive stance with the *U.K. Bribery Act of 2010* (Bribery Act), which took effect in July 2011. A complete overhaul of U.K. bribery and corruption laws dating back to the early 1900s, the Bribery Act applies to businesses operating in the U.K., but like the FCPA, it has extra-territorial reach. As a result, businesses with some part of their operations in the United Kingdom are also subject to the law.

The Bribery Act includes the following offenses:

- Offering, promising, or giving a financial or other advantage, known as active or supply-side bribery
- Requesting, agreeing to receive, or taking a financial or other advantage, known as passive or demand-side bribery
- Offering, promising, or giving a financial or other advantage to a public official

The corporate offense of failing to prevent bribery by an associated person, (i.e., any person or company that performs services for a company, including employees, agents, subsidiaries, and some joint ventures), can bring the company under scrutiny if the associated person offers or accepts a bribe.

Like the FCPA, the Bribery Act does not stop with the bribing of public officials. It also covers payoffs between two or more completely private entities. The FCPA carves out an exception for a small dollar "facilitation payment" made to expedite the performance of routine government actions by low-level officials. The Bribery Act includes no such exception, so payments of any kind could be considered a violation.

Penalties under the Bribery Act include imprisonment for up to 10 years and unlimited fines. Additional penalties may be imposed when combined with other U.K. regulations. For example, under the *Proceeds of Crime Act 2002*, there is the potential for the confiscation of property, and the disqualification of directors under the *Company Directors Disqualification Act 1986*.

The full impact of the Bribery Act has yet to be felt, but it is a critical consideration for any company with a presence in the United Kingdom. Furthermore, there is no double jeopardy for matters brought in different sovereign nations. As a result, improper conduct may result in liability under the Bribery Act, the FCPA, and other jurisdictions.

- Preventing companies from avoiding detection, investigation, and prosecution for bribery by using third party intermediaries to make payments.
- Periodically reviewing policies on small facilitation payments.
- Initiating or improving agreements between countries for the sharing of information and evidence in foreign bribery investigations and prosecutions, and the seizure, confiscation, and recovery of the proceeds of international bribery.
- Providing effective channels for public officials to report suspected foreign bribery internally and externally, and for protecting whistleblowers from retaliation.
- Working with the private sector to adopt more stringent internal controls, ethics, and compliance programs and procedures to prevent and detect bribery.

Beginning in 2005, the recommendations of the United Nations Convention Against Corruption began requiring member nations to criminalize corrupt acts if laws do not already exist, and to offer model preventive policies to enhance transparency and accountability in government dealings. Organizations such as Transparency International and the World Bank are also active in promoting anti-bribery efforts.

The FCPA is no longer the only set of anti-bribery and corruption rules that a multinational company must consider. There has been enforcement activity at varying levels in the United Kingdom (see *U.K. Bribery Act of 2010*), France, Germany, Hungry, Italy, Japan, Korea, Norway, Portugal, Sweden, and Switzerland.

Countries that have traditionally been inactive in enforcing anti-bribery and corruption laws have started making public overtures toward taking a more active role. Violating the regulations of multiple countries can lead to multi-jurisdictional enforcement actions for the same underlying conduct.

Staying out of trouble

Any large or small company doing international business should take steps to identify and address FCPA risks, and risks posed by the anti-bribery and corruption regulations of other countries. Organizations can do this through:

- Top management publicly addressing the value of FCPA and anti-bribery and corruption compliance, and outlining expectations of all employees.
- Internal controls and procedures designed to support an effective compliance program.
- Risk assessments.
- Periodic and ongoing review of practices and procedures.

- Education, training, and certification for all employees and third parties.
- Due diligence on all third parties, including agents, dealers, distributors, and joint venture partners.
- Due diligence in mergers and acquisitions for FCPA and anti-bribery and corruption risks.
- Frequent, effective two-way communication on anti-bribery and corruption issues.
- Periodic and ongoing monitoring and auditing.
- Enforcement and disciplinary proceedings for violations of the anti-bribery and corruption compliance program.
- An incident response program to report issues, including a hotline.
- A designated compliance office with appropriate seniority and reporting lines.

Author

- Ryan Merryman is a senior manager specializing in forensic valuation services.

About CliftonLarsonAllen

CLA is a professional services firm delivering integrated wealth advisory, outsourcing, and public accounting capabilities to help enhance our clients' enterprise value and assist them in growing and managing their related personal assets — all the way from startup to succession and beyond. Our professionals are immersed in the industries they serve and have specialized knowledge of their operating and regulatory environments. With nearly 4,000 people, 90 U.S. locations, and a global affiliation, we bring a wide array of solutions to help clients in all markets, foreign and domestic. For more information visit CLAconnect.com.