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FCPA: Developments, Challenges, Best Practices, Oh My!

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This presentation is provided for informational purposes and does not constitute legal advice.

Overview of Today's Presentation

- **What is the FCPA?**
- **The FCPA's Anti-Bribery Provision**
- **The FCPA's Accounting Provisions**
- **FCPA Penalties and Enforcement**
- **FCPA Trends and Developments**
- **What can companies do to minimize FCPA risk?**



“Bribery of foreign officials by some American companies casts a shadow on all U.S. companies.”

- **United States House of Representatives, 1977, 2020 *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2nd ed.)**

Let's Take a Poll

Responses will be displayed but will be anonymous.

How familiar are you with the FCPA?

- Very familiar
- Somewhat familiar
- Not familiar at all

What is the FCPA?

Foreign Corrupt Practices Act (FCPA)

15 U.S.C.A. § 78dd-1

§ 78dd-1. Prohibited foreign trade practices by issuers

Effective: November 10, 1998

[Currentness](#)

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to [section 78l](#) of this title or which is required to file reports under [section 78o\(d\)](#) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to--

(1) any foreign official for purposes of--

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

What Is the Foreign Corrupt Practices Act (FCPA)?

- U.S. law enacted in 1977 as an “anti-bribery” law
- Is enforced by the U.S. **Department of Justice** (DOJ) and the **Securities and Exchange Commission** (SEC).
- Two main components/provisions: (1) anti-bribery provisions, and (2) accounting provisions

The FCPA's Anti-Bribery Provision

The FCPA Anti-Bribery Provisions

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of--

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

Who is covered?

- **Issuers.** Any company (U.S. or foreign) with securities registered in the U.S. or that files reports with the SEC.
- **Domestic concerns,** which includes:
 - U.S. citizens, nationals, and residents.
 - Any U.S. entity organized under U.S. law or with its principal place of business in the U.S.
- **Directors, officers, employees, agents, and shareholders** of issuers and domestic concerns.

The FCPA Anti-Bribery Provisions

- Prohibits payments, offers, or promises made for the purpose of
 - Influencing any act or decision of a foreign official in his official capacity,
 - Inducing a foreign official to do or omit to do any act in violation of the lawful duty of such official.
 - Securing any improper advantage, or
 - Inducing a foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.

The FCPA Anti-Bribery Provisions (Continued)

- **Business purpose test:** The payment, offer, or promise must be made to assist “in obtaining or retaining business for or with, or directing business to, any person.”
- An offer, promise, or authorization of a payment, or a payment, must be made **corruptly**.
- Individual defendants must act **willfully** in order to be criminally liable.

Let's Break It Down: Anything of Value

- Cash or cash equivalents (such as gift cards).
- Stock or other interest in or profits from a business.
- Gifts (watches, handbags, golf clubs, etc.) or services.
- Travel, meals and lodging.
- Entertainment (theater tickets, sporting events, etc.).
- Personal favors (such as job offers or scholarships for the official's relatives).
- Discounts.
- Loans.
- Political contributions.
- Charitable payments.

What is allowed?

- A **small gift** or **token of esteem** may be an appropriate way for businesspeople to display respect for each other.
- Payments for **travel** and **lodging** directly related to business.

Foreign Official

- A **government** or **foreign official** includes any officer, employee, or person acting in an official capacity on behalf of:
 - A foreign government.
 - Any department, agency, or instrumentality of a foreign government.
 - A public international organization (for example, the UN or World Bank).
 - A foreign political party.
 - A political office (such as a candidate for political office).

POLL

True or False:

A company can be held liable for corrupt payments made by a third-party distributor?

- **True**
- **False**

Payments to Third Parties

If you deal with third parties as part of your job, be mindful that:

- If Company engages a third party, Company can be **legally responsible** for any improper conduct that the third party undertakes on Company's behalf.
- Third parties may include: agents, sales reps, contractors, brokers etc.

Third Party Red Flags

- Excessive commissions
- Large discounts
- Vague terms of service
- Close connection with foreign official
- Offshore bank accounts

Exceptions and Defenses

(1) Local Law Defense

(2) Reasonable and Bona Fide Expense Defense

(3) Extortion or Duress: Payments to Prevent Physical Harm

(4) Facilitating or Expediting Payments: Payments to facilitate or expedite routine, nondiscretionary governmental functions (e.g., issuing routine licenses)

The FCPA's Accounting Provisions

The FCPA Accounting Provisions

- Requires companies to maintain **accurate books and records** (accounting provisions).
 - Accounting provisions designed to identify bribery/concealment/mischaracterization
 - Require that these companies maintain (1) Accurate books and records, and (2) Internal accounting controls.
- **Applies to issuers:** companies whose securities are registered with the SEC or who must file regular reports with the SEC.

Let's take a closer look...

- **How do the two FCPA provisions work?** The accounting provision operates in tandem with the anti-bribery provision.
- **What is covered?** The accounting provision applies not only to bribery-related violations. It requires all public companies to provide accounting and books and requires “in reasonable detail.”
- **“In reasonable detail”?** Such a level that would “satisfy prudent officials in the conduct of their own affairs.”

FCPA Penalties and Enforcement

Penalties

Companies

- \$2 million criminal fine per violation or twice the gain.
- Debarment (company cannot do business with the government).
- Denial of export licenses.
- Disgorgement of profits.
- Expensive investigations and legal fees.
- Reputational damage.

Individuals

- Up to five years in prison per violation.
- \$250,000 criminal fine per violation.
- \$10,000 civil penalty or gross gain.
- Fines cannot be paid by company.
- Loss of job.
- Reputational damage.

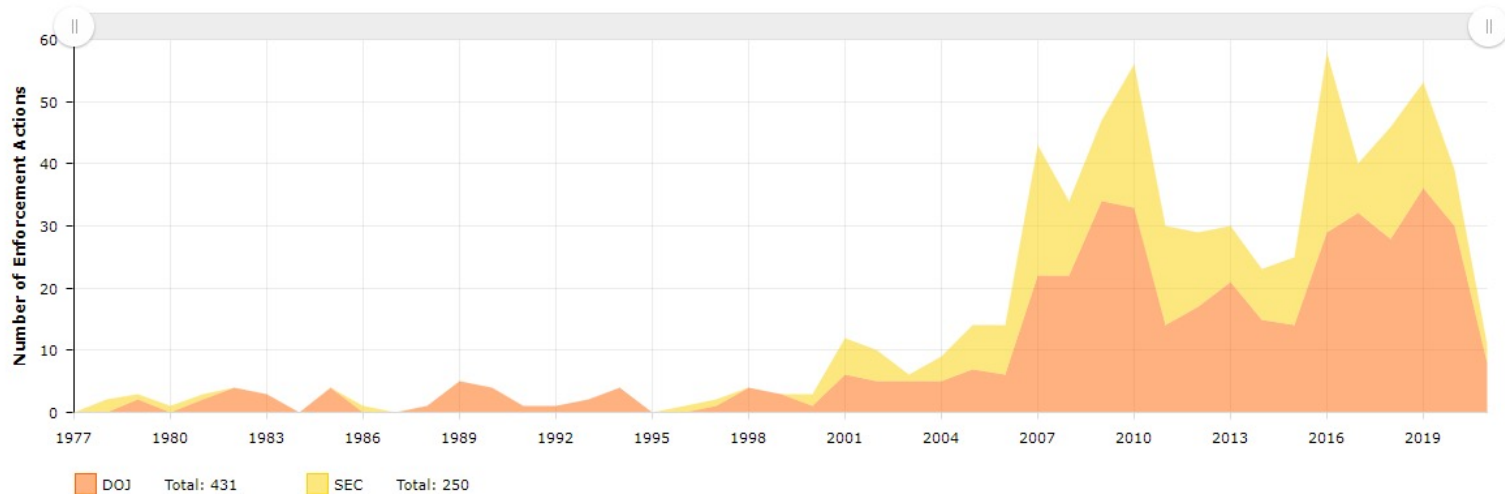
Enforcement Trends

- **Continuing corporate enforcement actions**

- 2019: DOJ (36 actions); SEC (17 actions)
- 2020: DOJ (30 actions); SEC (9 actions)
- 2021: DOJ (8 actions); SEC (3 actions)

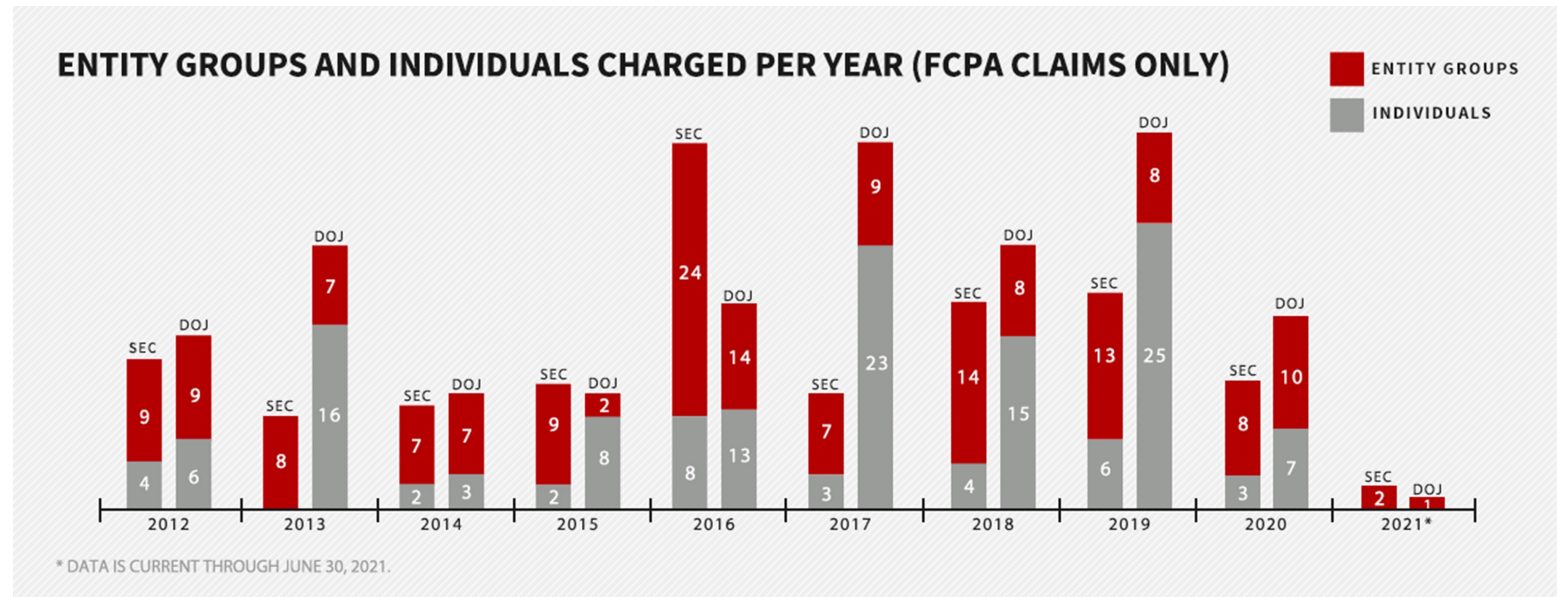
DOJ and SEC Enforcement Actions per Year

DOJ and SEC Enforcement Actions ▾



Data compiled and chart generated by Stanford Law School, Foreign Corrupt Practices Act Clearinghouse, available here: <https://fcpa.stanford.edu/statistics-analytics.html>

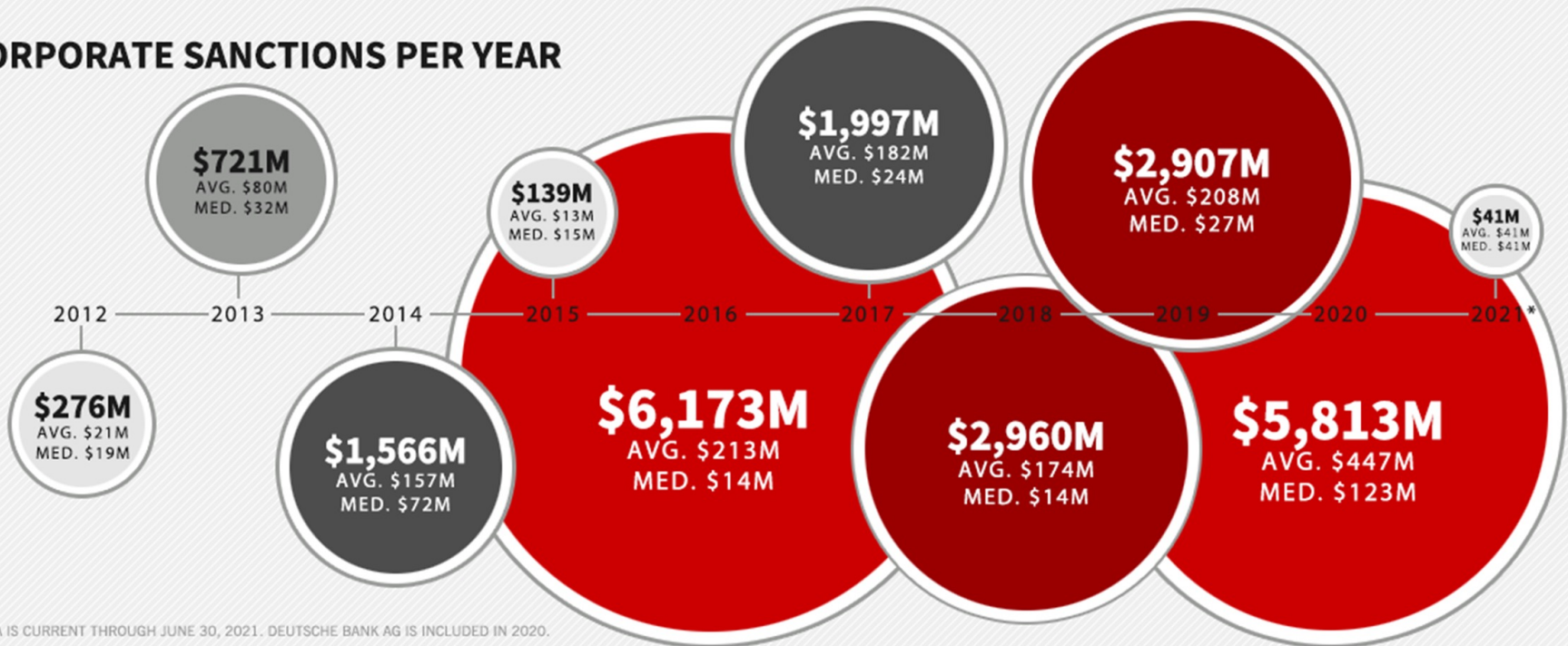
FCPA Related Charges: Entity vs. Individual



Data compiled and chart generated by Stanford Law School, Foreign Corrupt Practices Act Clearinghouse, available here: <https://fcpa.stanford.edu/>

Monetary Sanctions from 2012 - 2021

CORPORATE SANCTIONS PER YEAR

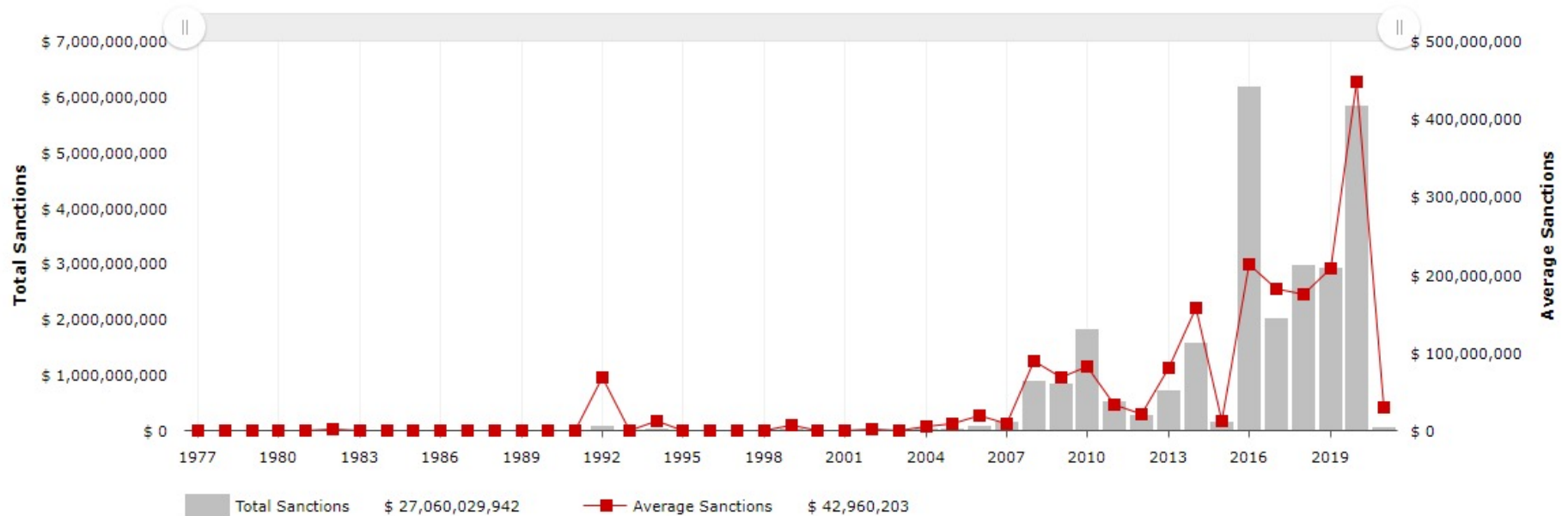


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Monetary Sanctions Imposed

Total and Average Sanctions Imposed on Entity Groups per Year

Total and Average Sanctions (Entity Groups) ▾



Data compiled and chart generated by Stanford Law School, Foreign Corrupt Practices Act Clearinghouse, available here: <https://fcpa.stanford.edu/statistics-analytics.html?tab=2>

FCPA Trends and Developments

Key Statistics

Key statistics from 1977 to Present

29% & 23%

Average Monetary Sanctions Discount for Companies
Pre and Post Pilot Program

28 Months

Average Length of Prison Sentence (Imprisonment or
House Arrest)

42%

Percent of Companies that Self-Reported

93%

Percent of Defendants Who Settled with the SEC

74%

Percent of Defendants Who Settled with the DOJ

38 Months

Average Length of an FCPA Related Investigations

38% vs 62%

Percent of Foreign & Domestic Defendants

\$ 13,169,795,708

Monetary Sanctions Paid to Foreign Governments in
FCPA-related Enforcement Actions

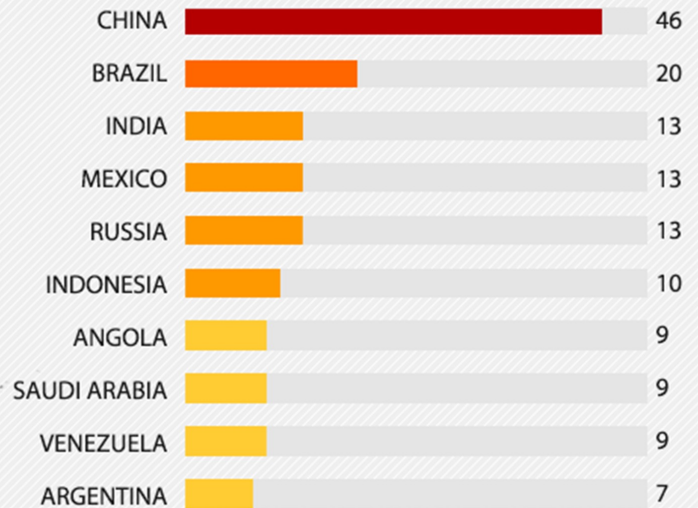
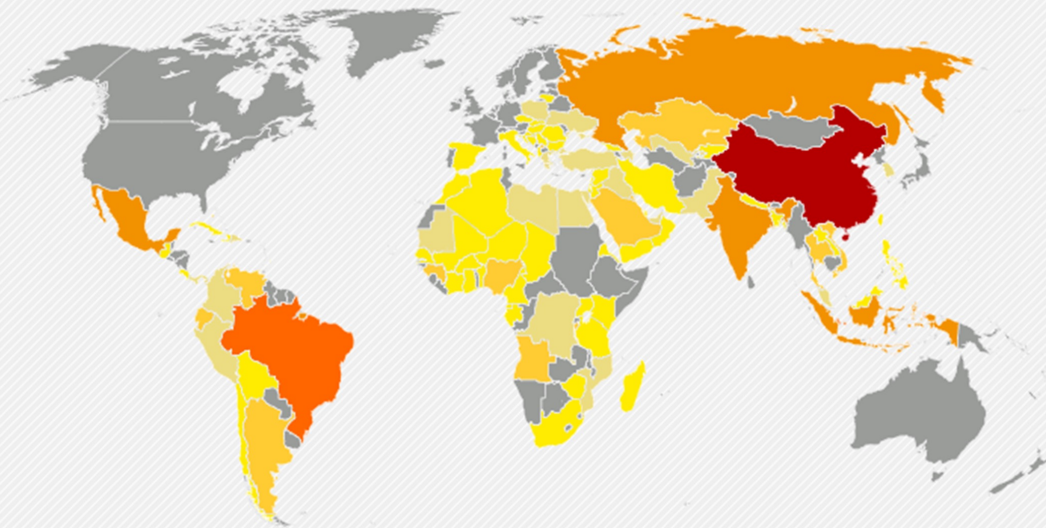
\$ 1,792,640

Average Monthly Cost For FCPA-related Investigation

Data compiled and chart generated by Stanford Law School, Foreign Corrupt Practices
Act Clearinghouse, available here: <https://fcpa.stanford.edu/statistics-keys.html>

Heat Map of Improper Payments

LOCATION OF IMPROPER PAYMENTS, 2012 - 2021*

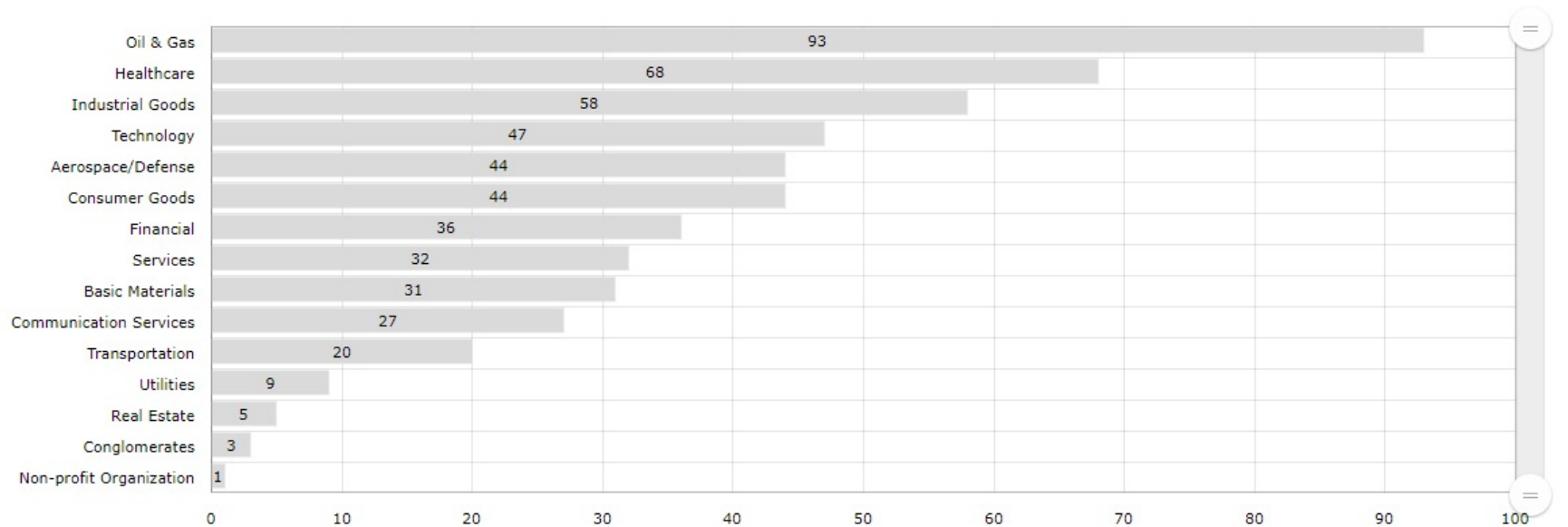


* DATA IS CURRENT THROUGH JUNE 30, 2021.

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<https://fcpa.stanford.edu/>

Industry Trends

Industry Classifications of FCPA Matters



Data compiled and chart generated by Stanford Law School, Foreign Corrupt Practices Act Clearinghouse, available here: <https://fcpa.stanford.edu/statistics-analytics.html?tab=9>

Policy Updates

- **“Evaluation of Corporate Compliance Programs” Update – DOJ (June 2020):**
 - “Adequately resourced and empowered to function effectively” compliance programs
 - Encouraged to document *why* and *how*
 - Continuous review and modifications
 - Reporting and tracking mechanisms
 - M & A due diligence and implementation
- **FCPA Resource Guide Update – DOJ and SEC (July 2020):**
 - Emphasis on accounting provisions
 - Possibility of benefits of proper compliance programs if exposure arises
 - Reemphasis on third-party liability standards
- **FCPA Opinion Procedure Release – DOJ (Aug. 2020)**
 - First one since 2014 in response to request by US-based investment advisor

What can companies do to minimize FCPA risk?

Conduct a Risk Assessment

- Data-driven analysis and review
- Document review
- Fact gathering, such as interviews with Company personnel

Being Proactive and Preventative

- **Understanding scope of present risks**
 - Country risk
 - Business and partnership risk
 - Industry/sector risk
 - Size of operations
- **Understanding risk touchpoints**
 - Third parties
 - Contacts with government

Why conduct risk assessments?

- Identify gaps in compliance, employee concerns, and areas of excellence
- Determine best use of resources and increase visibility for compliance
- Emphasizes importance of compliance to the company

Being Proactive and Preventative

- **Creating a compliance program to address present risks and risk touchpoints**
- **Continuing Compliance**
 - Train employees
 - Update policies
 - Reporting
 - Third-party management

Prosecutors consider the following:

Is the compliance program well designed? adequately resourced and empowered to function effectively?

Does the compliance program work in practice?

Hallmarks of Effective Compliance Programs

- Commitment from Senior Management and a Clearly Articulated Policy Against Corruption
- Code of Conduct and Compliance Policies and Procedures
- Oversight, Autonomy, and Resources
- Risk Assessment
- Training and Continuing Advice
- Incentives and Disciplinary Measures
- Third-Party Due Diligence and Payments
- Confidential Reporting and Internal Investigation
- Continuing Improvement: Periodic Testing and Review
- Mergers and Acquisitions: Pre-Acquisition Due Diligence and Post-Acquisition Integration
- Investigation, Analysis, and Remediation of Misconduct

Poll – TechCo Hypothetical

TechCo, a U.S. company, seeks to start doing business in China, projecting that it will increase its sales by tens of millions by entering the Chinese market. TechCo hires Consultant to facilitate business in China and to help navigate customs. Consultant is a local businessperson who has strong ties to political and government leaders in the country.

What steps should TechCo consider before hiring Consultant?

- A** - Vet the consultant and his/her role in the transaction, including her relationship with government contacts.
- B** - Ensure that the contract spells out exactly what services Consultant is providing.
- C** - Require Consultant to represent that she will abide by the FCPA.
- D** - Ensure that payments requested by Consultant have the proper supporting documentation before they are approved for payment.
- E** – All of the above.

Contact Information



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