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Webcast: FCPA Trends in the Emerging Markets of Asia

Kelly S. Austin
Oliver Welch
Karthik A. Thiagarajan
Ning Ning

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Presenters



Kelly S. Austin

Partner
Hong Kong Office
Tel: +852 2214 3788
Fax: +852 2214 3710
KAustin@gibsondunn.com



Oliver Welch

Partner
Hong Kong Office
Tel: +852 2214 3716
Fax: +852 2214 3710
OWelch@gibsondunn.com



Karthik Ashwin Thiagarajan

Of Counsel
Singapore Office
Tel: +65 6507 3636
Fax: +65 6507 3650
KThiagarajan@gibsondunn.com



Ning Ning

Associate Attorney
Hong Kong Office
Tel: +852 2214 3763
Fax: +852 2214 3700
NNing@gibsondunn.com

Topics to Be Discussed

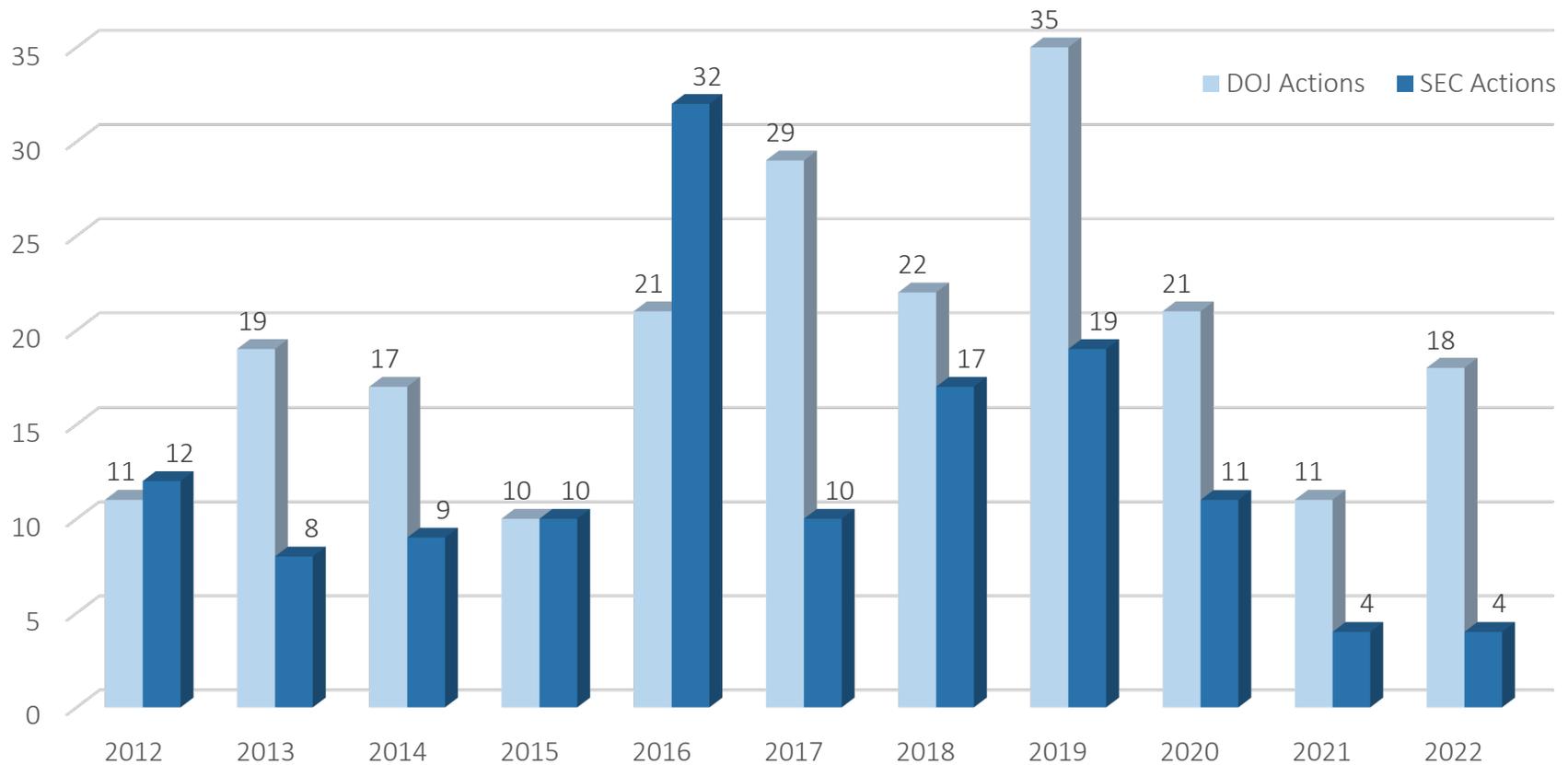
- **An Overview of FCPA Enforcement**
- **Asia Anti-Corruption Enforcement and Trends**
 - China
 - India
 - South Korea
 - Trends in Other Key Markets
- **Global Trends and Risk Mitigation Strategies**
- **Appendix: The FCPA**

An Overview of FCPA Enforcement



FCPA Enforcement Actions Per Year (2012-2022*)

Number of FCPA Enforcement Actions Per Year



*As of September 2022

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



* Minimum eight enforcement actions.

Enforcement of the FCPA: Criminal Penalties

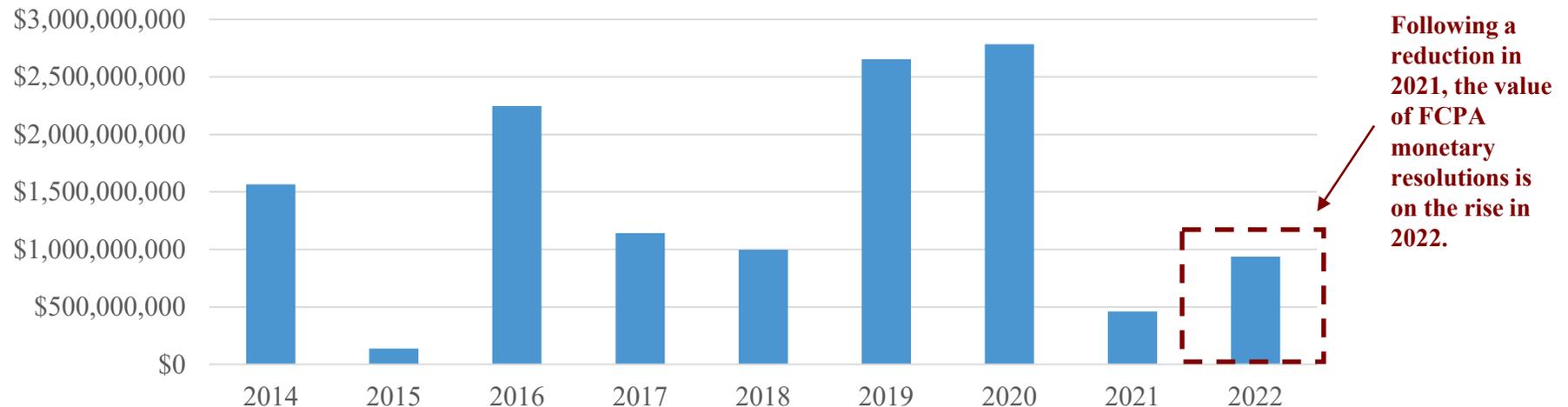
Anti-Bribery Provisions

- **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 – 2022)



2022 Enforcement Actions By Value

The DOJ and the SEC have brought more enforcement actions between January and September 2022 than in all of 2021. The penalties continue to be substantial.

No.	Company	Total Resolution	DOJ Component	SEC Component	Jurisdiction(s) in which alleged misconduct occurred	Date
1	Glencore International A.G.	USD 700,707,365	USD 700,707,365*	USD 0	Brazil, Cameroon, D. R. of Congo, Equatorial Guinea, Ivory Coast, Nigeria, Venezuela	05/24/2022
2	Stericycle, Inc.	USD 80,684,240	USD 52,500,000	USD 28,184,240	Argentina, Brazil, Mexico	04/2022
3	Tenaris S.A.	USD 78,100,338	USD 0	USD 78,100,338	Brazil	06/02/2022
4	GOL Linhas Aereas Inteligentes	USD 41,500,000	USD 17,000,000**	USD 24,500,000***	Brazil	09/2022
5	Jardine Lloyd Thompson	USD 29,081,951	USD 29,081,951****	USD 0	Ecuador	03/18/2022

*The DOJ agreed to offset USD 165,930,959 for payments made to U.K. and Swiss authorities in parallel proceedings. The DOJ also agreed to offset USD 90,728,597 for disgorgement payments made to the U.S. Commodities Futures Trading Commission in a parallel enforcement action.

** The DOJ reduced the original penalty of USD 87,000,000 to USD 17,000,000, given that the company could not pay the full fine and had paid a fine of USD 1,700,000 to Brazilian authorities.

*** The SEC reduced the original penalty of USD 70,000,000 to USD 24,500,000, given that the company could not pay the full fine and had paid a fine of USD 1,700,000 Brazilian authorities.

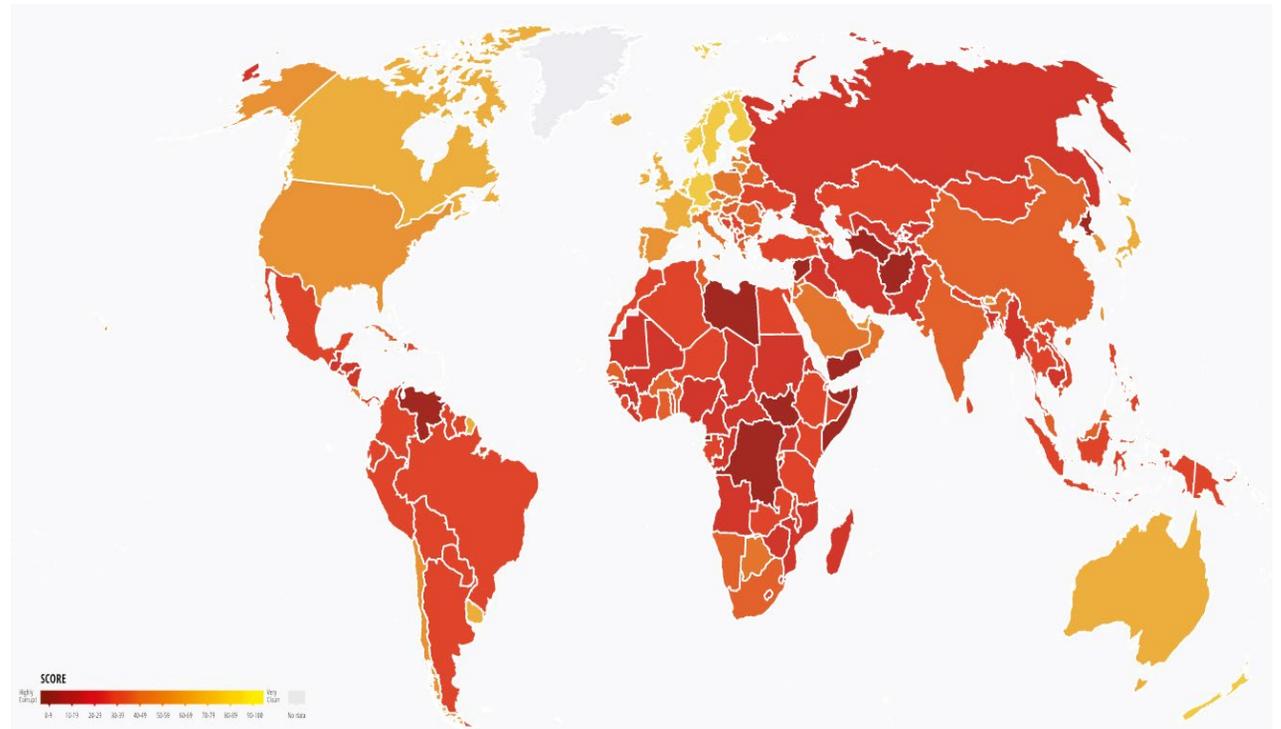
**** This amount was paid as a disgorgement to the U.K. Serious Fraud Office and credited in full in connection with the DOJ resolution.

Corruption Trends in Asia



CORRUPTION PERCEPTIONS INDEX 2021

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



China



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China: Market Characteristics



1.4 billion

Estimated population of China in 2022. Median age of 38.4.

USD 101.26 billion

China's foreign trade surplus in July 2022.

18%

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

~3.3%

Projected GDP growth in 2022, a 5% decrease from 2021.

2.70%

China's projected inflation for 2022.

USD 112.35 billion

Foreign direct investment into China through June 2022, a 17.4% increase year-on-year.

China: Corruption Landscape

China ranks **66th** out of 180 countries in Transparency International's latest Corruption Perceptions Index, a twelve-spot increase from last year's rankings.



According to World Bank's Global Governance Indicators, China improved from the **33rd** percentile in 2010 to the **58th** percentile in 2021 on "control of corruption."



53,049

Number of officials disciplined by CCDI in China in 2022 (through July) for violations of the "Eight Rules" (including embezzlement, bribery, abuse of power, misappropriation, dereliction of duty, and malpractice).

52,045

Number of cases investigated by CCDI in China in 2022 (through July) for violations of the "Eight Rules."

China: National Legislative Developments

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

- Encourages local procurators to grant non-arrest or non-prosecution decisions, or propose lighter penalties for corporate criminal cases (including commercial bribery), *in exchange for companies implementing compliance and remediation plans*.
- Since the launch of the Pilot Program in 2020, it has expanded to 10 provinces and 62 municipalities. As of June 30, 2022, local procurators have granted non-prosecution decisions for 606 companies and 1,159 individuals.

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 (i) review and revise the proposed compliance program, (ii) inspect the implementation of the compliance plan, and (iii) submit a report to the local procurators, which then make an arrest/prosecution/penalty decision.
- Among the 1,777 corporate compliance cases handled by local procuratorates as of May 31, 2022, 1,197 cases make use of third-party compliance monitoring, accounting for ~67% of the total number of corporate compliance cases.

Measures regarding the Establishment, Evaluation and Review of Compliance Programs for Enterprises Involved in Criminal Cases (for Trial Implementation) (“Measures”)

- Jointly promulgated in April 2022 by nine ministries of PRC Central Government, including the Supreme People’s Procuratorate (SPP).
- Provides guidance on (i) required components of corporate compliance programs; (ii) criteria for third-party monitors to evaluate corporate compliance programs; and (iii) criteria for the government to review third-party monitors’ reports on corporate compliance programs.

Example Case

To expand its product offering, a Shanghai-based technology company illegally obtained business information from an online food delivery platform by circumventing the platform’s data security measures. The local procuratorate decided not to prosecute the company and the individuals involved, in exchange for (1) the company establishing a robust data compliance program; and (2) the company undergoing three-month third-party monitoring with a satisfactory evaluation by the third-party monitor.

Key Takeaway

The recent developments provide helpful guideposts on Chinese government’s expectations of corporate compliance programs. Multinational companies with operations in China should ensure their local compliance programs align with these expectations.

China: National Legislative Developments

Data Protection Laws Relevant to Cross-Border Investigations Involving China

Personal Information Protection Law (“PIPL”)

- Article 38 of the PIPL sets out three ways that a personal information processor may **transfer personal information outside the PRC**: (1) passing an official data security assessment, (2) obtaining a personal information protection certification from an officially designated certification body, or (3) executing a contract incorporating standard contract clauses with the data recipient.

Measures for Security Assessment of Cross-border Data Transfer

- The Measures specify when a personal information processor **must apply for an official data security assessment** (e.g., processing sensitive information of 10,000 or more persons), as well as the procedure and the criteria of the assessment.
- The Measures become effective on September 1, 2022 and apply retroactively.

Guideline on Security Certification for Cross-border Transfer of Personal Information

- The Guideline, promulgated by a national technical standard body, sets out the requirement for obtaining a **personal information protection certification**.
- Multinationals transferring personal data from its PRC-based subsidiaries can apply for the certification, although no certification body has been designated to date.

Draft Standard Contract Clauses (“SCC”) for Transferring Personal Information Outside PRC

- A personal information processor can transfer data subject to a contract incorporating the SCC **only when an official data security assessment is not required**.
- To transfer personal information subject to the SCC, a personal information processor must conduct a privacy impact assessment (PIA), and file the contract and the PIA with the local government.

Key Takeaways

- Companies must **comply with cross-border data transfer requirements** before transferring any personal information outside of China.
- Monitor legal developments and review corporate compliance policies to ensure compliance with the rapidly evolving data protection rules.
- Seek local counsel advice regarding all aspects of data protection compliance; only PRC counsel can advise on PRC law.

China: National Legislative Developments

Regulations on Compliance Management for Central Government-owned Enterprises

- On August 23, 2022, the State-owned Assets Supervision and Administration Commission (“SASAC”) published the Regulations, effective October 1, 2022.
- Under the regulations, each state-owned enterprise (SOE) under the Central Government **must establish an effective compliance management system** that covers all aspects of the SOE’s business activities.
- The regulation requires that each SOE establish compliance policies and procedures (including anti-corruption policies), appoint compliance personnel, monitor compliance risks, conduct compliance trainings, and set up whistleblower hotlines, among others.

Regulations on Business Activities of Government Officials’ Spouses and Children

- Promulgated by the CCP’s Central Committee in June 2022.
- Requires senior- and mid-level government officials to report **all business activities of their spouses and children**, including investments in private companies and private equity funds, management roles at private or foreign-owned companies, and provision of professional services including legal services.
- Prohibits certain business activities by government officials’ spouses and children.
- Certain central government ministries and local governments have established similar regulations targeting specific industries or regions.

Key Takeaways

- Multinationals doing business in China should screen their potential new hires and business partners for connections with government officials, to avoid inadvertently running afoul of government regulations.

China: National Legislative Developments

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. According to news reports, certain local branches of the CCDI and the National Supervisory Commission have established databases of the bribe-giver blacklists.

Amended Regulation (2) Regarding the Prosecution Standard for Criminal Cases under the Jurisdiction of the Public Security Ministry (the “Regulation”)

- The Regulation came into effect on April 29, 2022 after promulgation by the Supreme People’s Procuratorate.
- Among other things, it reduces the standard for prosecution of “non-state functionaries accepting bribes” under the PRC Criminal Law from RMB 60,000 to RMB 30,000.
- It also reduces the prosecution standard for individuals for “bribing non-state functionaries” under the PRC Criminal Law from RMB 60,000 to RMB 30,000.

Key Takeaways

- Through a series of opinions and legislative amendments, the government is showing a strong focus on commercial bribery and the “supply side” of bribery.
- The combined effect of these changes will lead to increased enforcement related to receipt of bribes by non-state functionaries and bribe-giving activities.

China: International Agreements



U.S. PCAOB Agreement with Chinese Regulators on Audit Inspections and Investigations

- On August 26, 2022, the U.S. Public Company Accounting Oversight Board (“PCAOB”) signed a Statement of Protocol (“SOP”) with the China Securities Regulatory Commission (“CSRC”) and China’s Ministry of Finance regarding inspections of PCAOB-registered audit firms based in China and Hong Kong.
- According to the SOP, the PCAOB has **sole discretion** to select audit firms and audit engagements for inspections, has **direct access** to interview and take testimony from audit firm personnel, can inspect complete audit work papers **without redactions**, and has unfettered ability to **transfer any information to the SEC**.
 - For a limited set of “Restricted Data,” including **personally identifiable information**, PCAOB inspectors have *in camera* or “view only” access. PCAOB inspectors can also retain any information they have reviewed and forward the information to the SEC (including Restricted Data).
 - The SEC is of the view that it can use the information transferred from PCAOB (including Restricted Data) for any purpose, including **administrative or civil enforcement actions**.
- PCAOB inspectors are expected to commence their on-the-ground inspections in Hong Kong in September 2022.

Key Takeaways

- Although the SOP is a promising first step, whether the PCAOB *actually* can inspect and investigate according to the terms of the SOP remains to be seen.
- Potential SEC enforcement actions, including FCPA-related enforcement actions, based on the information obtained by PCAOB inspectors and transferred to the SEC.

China: Enforcement Trends

Banking & Finance

In 2022, the Chinese government has continued its anti-corruption campaign *targeting the banking industry*. More than 70 executives and government officials in the banking industry have been investigated, charged or penalized since the beginning of 2022:

- In April 2022, the Central Commission for Disciplinary Inspection (CCDI) investigated Zeng Changhong, a former official at the China Securities Regulatory Commission, for alleged bribe-taking.
- In April 2022, CCDI investigated Tian Huiyu, former CEO of the China Merchants Bank, for alleged “violations of the law.”

On August 22, 2022, the China Banking and Insurance Regulatory Commission issued the Administrative Measures for Internal Controls of Wealth Management Companies.

- Each wealth management company must appoint a chief compliance officer, create a dedicated internal control function, establish internal control policies and procedures, and audit its internal controls at least annually, among others.

Insurance Industry

The Chinese government has stepped up its anti-corruption enforcement efforts *targeting the insurance industry*:

- In May 2022, Shen Dong, former vice president of PICC Property and Casualty Co., was expelled from the CCP after a CCDI investigation against him for suspected bribe-taking.
- In August 2022, CCDI investigated Xie Xian, a former inspector of the China Banking and Insurance Regulatory Commission, for suspected “serious disciplinary violations.”
- In September 2022, Wang Bin, former chairman of China Life Insurance (Group) Company, was expelled from the CCP and referred to judicial proceedings, following a CCDI investigation into his alleged bribe-taking.

China: Enforcement Trends

Healthcare Sector

Combating corruption in *the healthcare industry* continues to be the focus of Chinese government's anti-corruption campaign:

- In May 2022, nine ministries of the Chinese Central Government jointly issued the *2022 Key Tasks on Safeguarding the Integrity of Medical Procurement and Medical Services*, which highlights the government's *enforcement focus on combating corruption* in the healthcare sector, including illegal kickbacks and commercial bribery.
- Since the beginning of 2022, around 50 hospital executives have been investigated for accepting kickbacks or bribes.
- In June 2022, the National Healthcare Security Administration added five pharmaceutical and medical device companies to a "*blacklist*" because of alleged bribery payments they provided to hospital personnel.
 - Provincial-level healthcare administrations have also established "blacklists" for their respective provinces.
 - "Blacklisted" companies may be prohibited or restricted from participating in the government's public procurement process.

Semiconductor Sector

In 2022, the Chinese government expanded its anti-corruption campaign to encompass *the semiconductor industry*:

- In July 2022, Zhao Weiguo, former chairman of Tsinghua Unigroup, a Chinese chip conglomerate, was placed under investigation.
- In July 2022, Xiao Yaqing, former head of the Ministry of Industry and Information Technology (MIIT), was investigated by the CCDI for "suspected violations of discipline and law." MIIT is responsible for overseeing China's semiconductor industry.
- Since July 2022, CCDI has announced multiple investigations into senior executives at China Integrated Circuit Industry Investment Fund, including the fund's former chief executive. The fund is a state-backed investment vehicle that invests in Chinese semiconductor companies.
- In August, Xiang Zizhong, former deputy general manager of China Electronics Corporation, a state-owned conglomerate, was investigated by the CCDI.

Lessons Learned from Recent 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.

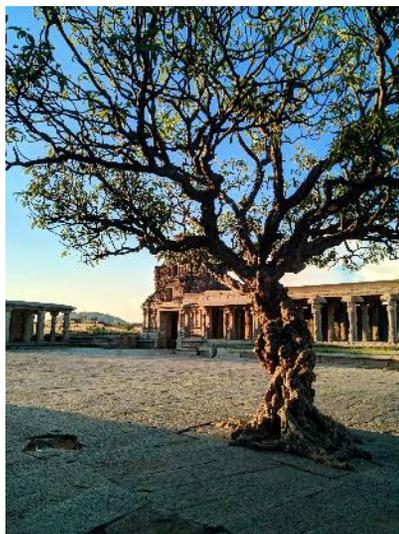
INDIA



Photo courtesy Manyu Varma

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India: Market Characteristics – Opportunities and Challenges



59.5%

Domestic consumption as a percentage of India's GDP.

USD 85 Billion

Among top 10 FDI recipients in FY 2021-2022.

7.4%

Projected growth of the Indian economy in 2022-2023. Reduced because of inflation and external factors.

40%

One of the lowest labour force participation ratios among major economies.

57%

Percentage of national income held by the top 10% of Indian adults, reflecting extreme income inequality.



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 >>> 85

TI has noted India to be a “particularly worrying” case in Asia, with a stagnant score over the last decade and anti-corruption mechanisms that are weakening.



38.6 >>> 46.6

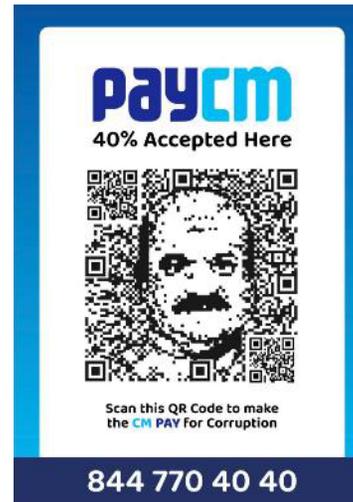
The bureaucratic labyrinth at the federal and provincial levels and poor anti-corruption enforcement have allowed bribery and corruption to flourish:

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.



A social media campaign on recent corruption allegations made against the Chief Minister of Karnataka that went viral.

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 operational 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 by employees and officers.
- Guidance by the Institute of Chartered Accountants urges auditors to report bribes and corrupt acts.
- Broadly, for frauds involving INR 10 million (USD 123,000) or more, 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 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 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.
- During 2021-2022, Lokpal received 5,680 complaints. Of these, 5,100 complaints are yet to be registered.
- Information on the rules and format for filing complaints with Lokpal was published in March 2020. Recently, the Lokpal cautioned that it will only accept complaints that follow the prescribed format.
- Some state governments attempted to constitute an anti-corruption bureau in a bid to usurp power from the state Lokayuktas.

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.

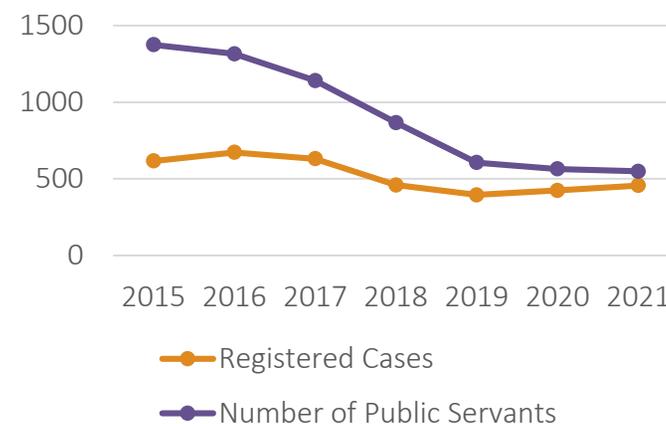
The 2018 Amendments

- 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 between 2015 and 2019 has stabilized since 2020.
- Cases that are pending investigation after 5 years have steadily increased, though the number of cases for 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 2016–2021

India: Trend — Weakened Anti-Corruption Laws and Strengthened State Powers

Recent legislative changes raise questions about the Indian government's commitment to anti-corruption efforts and weaken procedural safeguards

The Consent Quagmire

- The requirement to obtain various types of consent causes critical delays and makes investigations subject to greater political interference.
- The 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.
- 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.
- The 2018 Amendments to the PCA requiring consent even to commence investigations can be used to stymie investigations.

Prevention of Money Laundering Act (PMLA)

- A recent decision of the Supreme Court upheld controversial provisions of the PMLA, which allow for searches and arrests without basic safeguards.
- PMLA permits authorities to record statements on oath, contrary to procedural checks prescribed under the Indian Constitution and evidence laws.
- The list of offences scheduled under the PMLA has increased substantially from the original scheme.

PMLA

- Enacted in 2002
- Notified in 2005
- Targets proceeds of crime

Effectiveness of the PMLA

- Number of Cases: 5,400
- Convictions: 23
- Conviction Rate: 0.43%
- Attachment of Property: Worth USD 12.07 Billion

Sources: CBI; Business Standard (July 2022); Economic Times (2022).

India: Biocon Biologics Case

Background

- In June 2022, the CBI arrested an officer belonging to India's drug regulator—the Central Drugs Standard Control Organization—and an employee of Biocon Biologics on allegations of corruption. The CBI has alleged that the arrested public official accepted a bribe from a middle-man representing Biocon Biologics in order to grant a clinical trial waiver for a new drug.
- Biocon Biologics is a subsidiary of Biocon Limited, a very well-known Indian biotechnology company. Biocon Biologics is engaged in the business of developing and producing biosimilars for various diseases.
- The CBI also arrested another public official from the drug regulator and employees of two private firms that were liaising with the drug regulator on behalf of Biocon Biologics.
- The alleged bribe involved amounts to INR 900,000 (approximately USD 11,000).

Key Takeaways

- The alleged bribes were not large, but the enforcement action can cause significant reputational issues. *Zero tolerance in relation to bribery and fraud – no de minimis exemptions.*
- Leaky investigative and judicial process. *There should be no expectation of confidentiality when investigations are on-going.*
- Risks increase significantly when engaging third-party intermediaries for governmental approvals. *Do you really need a third-party intermediary? Controlling sub-contractors.*
- In India, bribery can trigger issues under the PCA and laws relating to corporate governance. *Identify knock-on effects beyond the PCA.*



Sources: New Indian Express (August 2022); The Print (September 2022)

SOUTH KOREA



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Korea: Market Characteristics



51.8 million

Estimated population of Korea in 2022 (a 3% decline from 2021).

USD 750 billion

Korea's value of exports for 2021 (a 25.7% increase over 2020).

4.0%

Korea's GDP growth rate for 2021 (after posting negative growth for 2020).



18.9%

Expected decline in Korea's working-age population (between 15 and 60 years old) from 2018 to 2037, primarily due to low fertility rate.

27%

Percentage of all business assets in Korea which are owned by the top 10 chaebols.

Korea: National Legislative Developments

Improper Solicitation and Graft Act

- In late 2021, the Korean National Assembly amended the *Improper Solicitation and Graft Act*, Korea's primary anti-corruption legislation.
- The amendments included *employment and internship opportunities*, among other things, in its expanded list of what might be considered an improper advantage under the Act. The amendments also allow *anonymous reporting through attorneys*, and expand the reduction in liability available to reporters who have violated anti-corruption laws, to include non-prosecution and exemption from administrative fines.

Act on the Prevention of Conflict of Interest Related to Duties of Public Servants

- From May 26, 2022, a new *conflict of interest law* came into force prohibiting ~2 million public officials from using information related to their job responsibilities to seek personal gain.
- The Anti-Corruption & Civil Rights Commission announced that it would be conducting an inspection of all high-ranking officials in the second half of 2022.

Corruption Investigation Office for High-Ranking Officials (CIO)

- In January 2021, the Korean government launched the CIO to investigate allegations against current and former senior officials.
- The agency can investigate crimes committed by high-ranking officials and their families and “related crimes” involving private parties.
- Private companies and their employees fall within the scope of the CIO's investigative powers.
- In the first year of the CIO, of the **24** corruption cases it investigated, it completed just **one**.
- We recommend conducting detailed risk assessments when dealing with high-ranking officials.

Korea: Historic Enforcement & Pardons Involving Former Presidents

Former President Park Geun-Hye

- President Park Geun-Hye was impeached in December 2016 amid allegations of influence peddling and corruption. In April 2018, Park was convicted of 16 corruption-related offenses, including abuse of power, bribery, and coercion. She was ultimately sentenced to 25 years' imprisonment and a fine of KRW 20 billion (~USD 18 million).
- Choi Soon-Sil, Park's friend and advisor who was accused of coercing Korean conglomerates into donating millions of dollars to charitable organizations connected to the former President, was sentenced in February 2018 to 20 years' imprisonment for influence peddling, abuse of power, and corruption.
- In December 2021, then-President Moon Jae-In reversed a campaign pledge by granting Park a Presidential pardon, citing the need to “overcome unfortunate past history, promote people's unity and join hands for the future.”



Former President Lee Myung-Bak

- In March 2018, former president Lee Myung-Bak was arrested on multiple charges of corruption, including bribery, embezzlement, tax evasion, and abuse of power. Lee allegedly received more than KRW 11 billion (~USD 10 million) in bribes from various sources, including Samsung and the Korean National Intelligence Service, before and during his presidency. In October 2018, Lee was sentenced to 15 years' imprisonment and a fine of KRW 13 billion (~USD 11.5 million) for bribery and embezzlement. He remains in prison despite speculation of a forthcoming pardon by current President Yoon Suk-Yeol.

Korea: Enforcement & Pardons—Chaebol

President Park’s impeachment and conviction led to enforcement actions against executives of Korean conglomerates, known as the *chaebol*. However, recent pardons have undermined public perception that Korea is moving away from corruption at the highest levels of business and politics.

Samsung

- In August 2017, Samsung Electronics Vice Chairman Lee Jae-Yong was convicted of bribery and related charges and sentenced to five years in prison. On appeal, the Seoul High Court found Lee not guilty on charges involving payments to the foundations associated with President Park and Choi Soon-Sil, and halved his jail term to 2.5 years and suspended his sentence on appeal.

Lotte

- In December 2017, Lotte Group Chairman Shin Dong-Bin was arrested on charges of embezzlement and breach of trust. In October 2018, the Seoul High Court sentenced Chairman Shin to 2.5 years in prison, but suspended the sentence for four years, resulting in his immediate release.
- In August 2022, current President Yoon Suk-Yeol formally pardoned Messrs. Lee and Shin.

SAMSUNG
LOTTE

“We selected major business people that lead national growth engine, aggressively carry out technology investment, and create jobs, and included them in the pardon list given urgency in overcoming economic crisis.” - Ministry of Justice

Korea: Steady FCPA Enforcement Action Involving Conduct or Companies in Korea

- **2018:** Multinational conglomerate *United Technologies Corporation* paid USD 13.9 million to settle a SEC enforcement action alleging that it (among other things) provided entertainment and travel benefits to five officials of the Korean Air Force in hopes of securing a long-term procurement contract. The SEC alleged that UTC's internal controls had failed to prevent the misconduct.
- **2019:** *Barclays PLC* paid USD 6.3 million to settle a SEC enforcement action alleging FCPA violations in the hiring of relatives of government officials and private sector customers in exchange for business advantages in Korea and elsewhere.
- **2019:** *Samsung Heavy Industries* paid USD 75 million to settle a DOJ enforcement action, which alleged that the company paid \$20 million in commissions to a Brazilian intermediary while knowing that portions of the money would be paid as bribes to officials at Petrobras, Brazil's state-owned energy firm.
- **2020:** *Novartis* paid USD 346.7 million to settle DOJ and SEC enforcement actions alleging that the company made improper payments to influential healthcare practitioners in exchange for increased prescriptions of Novartis products.

Key Themes

- Dangers of gifts, hospitality and travel.
- Potential corruption in hiring practices at financial institutions.
- Pitfalls of reliance on intermediaries.
- Enforcement in high-risk sectors, such as healthcare and manufacturing.

Korea: Lessons Learned from KT

Background

- In February 2022, KT Corporation (“KT”), South Korea’s largest telecom company, settled allegations of FCPA accounting provisions violations brought by the SEC.
- SEC alleged that KT *lacked sufficient internal accounting controls* over expenses, which enabled managers and executives to generate slush funds. KT employees then allegedly used these funds to make payments to government officials in Korea and Vietnam in exchange for business advantages.
- KT had *no relevant anti-corruption policies or procedures* with respect to donations, employment candidates, vendors, subcontractors, or third-party agents.
- KT paid **USD 6.3 million** as part of the settlement. KT also agreed to report to the SEC every six months for two years regarding the status of its remediation and implementation of compliance measures.



Key Takeaways

- Companies should ensure that expense reporting and documentation practices are particularly robust in countries known for corruption risks.
- Robust, comprehensive anti-bribery policies and procedures are necessary. Policy gaps may result in improper payments, and can themselves give rise to a violation of the FCPA.
- Companies may be charged in multiple jurisdictions for the same conduct. In November 2021, South Korean authorities indicted KT Corp. and 14 executives in connection with the same slush funds.

Trends in Other Key Markets



Malaysia: Recent National Developments

First Breach of Section 17A Anti-Corruption Commission Act 2009 (MACC)

- In March 2021, Pristine Offshore Sdn Bhd and its former director became the first to be charged by the Malaysia Anti-Corruption Commission under the new Section 17A of the MACC.
- Under Section 17A, a commercial organisation commits a criminal offence if a person associated with it corruptly gives any gratification with intent to obtain or retain any business or advantage for the commercial organisation.
- Critically, section 17A contains a defence: an organization can prove that it “*had in place **adequate procedures** to prevent persons associated with the commercial organization*” from committing acts of bribery.

First person charged under the Whistleblower Act 2010 Recently Acquitted

- In May 2022, the CEO of an education company was acquitted after a judge found that the prosecution had failed to establish a *prima facie* case against him. Wafiy Abd Aziz, 37, was charged in 2020 with terminating the employment of an individual who had made a whistleblower report.



Adequate Procedures

- Top-level Commitment
- Risk Assessment
- Undertake Control Measures
- Systematic Review, Monitoring and Enforcement
- Training and Communication

Malaysia: 1MDB Enforcement Continues

1Malaysia Development Berhad (1MDB)



- In February 2021, Malaysian banking group AMMB Holdings Berhad agreed to pay MYR 2.83 billion (~US\$ 682.3 million) to settle outstanding claims related to the 1MDB corruption scandal. Government and media reports did not identify AMMB's misconduct, but noted that the company would be required to strengthen its compliance controls, specifically its due diligence framework.
- In August 2022, Malaysia's highest court upheld the trial ruling of Najib Razak, the former Malaysian prime minister, on seven counts of **abuse of power, money laundering and criminal breach of trust** for embezzlement from the 1MDB state fund. According to Malaysian authorities, Najib illegally received more than **US\$1 billion** traceable to 1MDB.



Key Takeaways

- The 1MDB scandal highlights the importance of ensuring that due diligence processes are robust to identify risks holistically, and that staff are adequately trained to follow risk management processes.
- Companies should ensure that staff are well trained on escalation policies and procedures in the event that they encounter suspicious activities.
- Staff should also be reminded of the importance of accurate record-keeping.

Prosecution of Former Managing Director of Goldman Sachs

In April 2022, a former managing director of Goldman Sachs was convicted on three counts of FCPA conspiracy charges, including for money laundering and **sidestepping internal accounting controls** for his part in the 1MDB scandal.

Hong Kong: Enforcement Trends

Hong Kong is ranked **12th** in Transparency International's latest Corruption Index, and Hong Kong authorities continue to be active in investigating and prosecuting corruption. The number of corruption complaints received by Hong Kong's Independent Commission Against Corruption ("ICAC"), and the number of persons prosecuted, increased from 2020 to 2021.

ICAC Data	2020	2021
Corruption Complaints Received (<i>excluding election complaints</i>)	1,924	2,264 (+18%)
Persons Prosecuted (<i>excluding election cases</i>)	153	190 (+24%)
Private Sector	1,134	1,482 (+31%)
Public Bodies	161	137 (-15%)



Hong Kong Airport Authorities

- In August 2022, the ICAC brought corruption charges against the principal manager of the Airport Authority, and a proprietor of a sub-contractor for allegedly accepting and offering bribes in relation to the Three-Runway System Project of the Hong Kong International Airport. The alleged improper payments totaled approximately HKD 3.8 million (USD 484,000).
- In total, the government arrested 30 individuals in relation to the investigation.

Japan: National Legislative Developments and Enforcement Trends

Although Japan is considered one of the least corrupt countries in Asia, Japan recently faced criticism from the Organisation for Economic Co-operation and Development (“OECD”) for low-level and “*weak enforcement*” on corruption. In response, Japanese authorities have sought to increase the incentives for firms to self-report.

Whistleblower Protection Act

- In June 2022, amendments to the Whistleblower Protection Act came into force, creating ***a mandatory obligation for companies of a certain size to establish an internal whistleblowing system.***
- Companies must designate personnel to receive whistleblowing reports; investigate allegations and take corrective measures; and establish an internal system to respond to whistleblowing reports.
- Japan’s Consumer Affairs Agency (“CAA”) has authority to take certain measures, including: (1) making inquiries; (2) giving guidance and recommendations to business operators that fail to meet the requirements; and (3) publishing the name of business operators who fail to follow recommendations.
- Business operators who fail to report following a CAA inquiry, or who provide false statements to the CAA, may be subject to an administrative fine not exceeding JPY 200,000 (~\$1,500).



High Profile Corruption Cases: Tokyo 2020 Olympics

- In July 2022, Tokyo prosecutors raided the house of Hironori Aoki, founder and former chairman of Aoki Holdings. Prosecutors allege that Aoki had bribed Haruyuki Takahashi, a former executive board member of the Tokyo Olympic Games organizing committee, with ¥45 million (USD 330,000) ***in exchange for preferential treatment when selecting sponsors for the Olympics.***

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 Deferred Prosecution Agreement (“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

- **China:** China has expanded the Pilot Program for Corporate Criminal Compliance to 10 provinces and 62 municipalities since its launch in 2020. 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.
- **Singapore:** Singapore amended its criminal laws in 2018 to enable the public prosecutor to enter into DPAs with corporate entities. The DPA can require, among other things, financial penalties, appointment of a monitor, disgorgement of profits, and implementation of compliance programs.

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, and compensation systems that reinforce compliance and deter misconduct.

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 a bribe solicitation.

Trend: Increasing Whistleblower Activity and Protections for Whistleblowers

U.S. SEC Amends Whistleblower Rules

- In August 2022, the SEC adopted two amendments to the rules governing its whistleblower program. These amendments come into effect in October 2022.
- The first amendment allows the SEC to pay whistleblowers for their information and assistance *in connection with non-SEC actions* in the following circumstances (even if the SEC program does not have the more direct or relevant connection):
 - (1) the non-SEC program has a range or cap that could yield a meaningfully lower amount than under the SEC’s program;
 - (2) the decision to grant an award under the non-SEC program is discretionary; and
 - (3) the maximum award the SEC could pay does not exceed \$5 million.
- The second amendment affirms the SEC’s authority to consider the dollar amount of a potential award for the limited purpose of *increasing an award* but not lowering an award.

SEC Whistleblower Program Annual Award Activity		
Year	Total Awards	Number of Recipients
2021	\$564 million	108
2020	\$175 million	39
2019	\$60 million	8

Recent Trends and Awards

- The SEC whistleblower program has seen a steady increase in both the amounts and number of award recipients since 2019.
- Since 2012, the SEC alone has awarded approximately \$1.3 billion in whistleblower awards.
- In July 2022, the SEC announced a \$17 million award to a whistleblower who provided both information and assistance that led to success in an SEC action and a related action.

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.
- *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 in Asia have implemented or considered implementing new whistleblower protection laws.
 - *China* issued the “Interim Measures for Rewards for Whistleblower Reports of Major Violations in the Field of Market Regulation” in 2021, which rewards whistleblowers in certain circumstances.
 - *Indonesian* law affords protection to employees who face certain forms of retaliation for reporting legal violations to authorities.

The SEC has made clear that the fact that a whistleblower is a foreign national is not a barrier to receiving an award. In 2014, the SEC 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:

Across Asia: Sales Agents, Distributors, Sham Service Providers/Fictitious Vendors, PR & Marketing Firms, Travel Agents, Joint Venture/Business Partners.

Country Specific:

China: Clinical Research Organizations, Consultants for Government Subsidies.

India: Tendering & Procurement Agents, Government Liaison Agents.

Indonesia: Permitting Agents, Village and Indigenous Group Representatives, Off-duty Government Officials (e.g., Police Providing Security Services).

Korea: Event Planners.

Malaysia: Liaison Agents.

Recent FCPA Actions involving Third-Party Agents

- In May 2022, **Glencore** paid a criminal fine of USD 428 million to resolve, among other things, violations of the FCPA involving the making and concealing of bribes to various foreign officials through intermediaries.
- Closer to home, in February 2022, South Korea's **KT Corporation** resolved FCPA charges by paying USD 3.5 million in civil penalties and another USD 2.8 million in disgorgement for paying bribes to government officials in Vietnam to swing two government projects. These bribe payments were routed to these officials through intermediaries as fees for "consulting services."

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 *prone to corruption* that 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 among the sales force, third parties (e.g., distributors, agents) and end-customers, and conduct function-specific compliance training with these employees and third parties.
- Understand whether the discounts to intermediaries are *passed on* to end-customers by reviewing publicly 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).



Resources

- Resources
- Gibson Dunn Anti-Corruption & FCPA Practice Group
- Gibson Dunn Webcasts (CLE Credit Available)

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