

FCPA Update

A Global Anti-Corruption Newsletter



Also in this issue:

9 2020's Corruption Perceptions Index: Continued Stagnation, COVID Challenges, and FCPA Enforcement

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SEC Pays \$28 Million in FCPA Whistleblower Award

The U.S. Securities and Exchange Commission recently announced that it had awarded \$28 million to a whistleblower.¹ The announcement garnered even greater attention when it was reported that the whistleblower's tip was related to the 2018 Panasonic Avionics enforcement action.² The SEC's Whistleblower Program³ has been in existence since the passage of the 2010 Dodd-Frank Act,⁴ but 2021

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1. Press Release, Sec. & Exch. Comm'n, "SEC Awards More Than \$28 Million to Whistleblower Who Aided SEC and Other Agency Actions" (May 19, 2021) ["May 19 Press Release"] <https://www.sec.gov/news/press-release/2021-86>.
2. Mengqi Sun, "Whistleblower Is Awarded \$28 Million in Panasonic Avionics Case", Wall St. J. (May 19, 2021), <https://www.wsj.com/articles/whistleblower-is-awarded-28-million-in-panasonic-avionics-case-11621443228>.
3. *Office of the Whistleblower*, Sec. & Exch. Comm'n, <https://www.sec.gov/whistleblower>.
4. Securities Exchange Act of 1934, 15 U.S.C. § 78u-6 (as amended by § 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 USC § 5301).

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has been a particularly active year; May alone saw approximately \$85 million in rewards to whistleblowers.⁵ The frequency and amount of the 2021 awards are, in a sense, an indication of the program's success,⁶ as is the expansion of the concept of whistleblower rewards to other areas, like the Kleptocracy Asset Recovery Rewards Act ("KARRA") pilot project included in the 2021 National Defense Authorization Act.⁷ However, headlines about the Panasonic case and enthusiasm for modern day bounties should not obscure how rare whistleblower awards remain and how delayed payment can be, particularly in the FCPA context.

Panasonic Case

In April 2018, Panasonic Avionics entered into a deferred prosecution agreement with the Department of Justice,⁸ and Panasonic Corporation resolved charges with the SEC, agreeing to pay a combined \$280 million in penalties and disgorgement to the agencies, related to violations of the books and records and internal controls provisions of the FCPA.⁹ While the analysis that goes into determining whistleblower rewards is heavily redacted, it would appear from the SEC's Award Order that the whistleblower in this case was awarded 10% of the total amount paid to SEC and DOJ in penalties and disgorgement.¹⁰ The unredacted portions of the Award Order do not provide much clarity on the rationale behind the number, other than to note that there was "not a strong nexus between the claimant's information and the Commission and Other Agency's charges."¹¹

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5. May 19 Press Release, *supra* note 1; Press Release, Sec. & Exch. Comm'n, "SEC Awards More Than \$31 Million to Whistleblowers in Two Enforcement Actions" (May 17, 2021), <https://www.sec.gov/news/press-release/2021-85>; Press Release, Sec. & Exch. Comm'n, "SEC Awards Approximately \$3.6 Million to Whistleblower" (May 12, 2021), <https://www.sec.gov/news/press-release/2021-83>; Press Release, Sec. & Exch. Comm'n, "SEC Awards \$22 Million to Two Whistleblowers" (May 10, 2021), <https://www.sec.gov/news/press-release/2021-81>.
 6. This is further evidenced by the strong support for the program from the recently confirmed SEC Chair, Gary Gensler. See Geoff Schweller, "Gensler Confirmed as SEC Chair Following Pledge of Support to Whistleblower Program", Whistleblower News Network (Apr. 14, 2021), <https://whistleblowersblog.org/2021/04/articles/corporate-whistleblowers/sec-whistleblowers/gensler-confirmed-as-sec-chair-following-pledge-of-support-to-whistleblower-program/>.
 7. National Defense Authorization Act (2021) Pub. L. No. 116-283, §§ 9701-9703 ["NDAA"]; see "Pending U.S. Legislation Will Expand Anti-Kleptocracy Initiative", FCPA Update, Vol. 12, No. 5 (Dec. 2020), <https://www.debevoise.com/insights/publications/2020/12/fcpa-update-december-2020>.
 8. *U.S. v. Panasonic Avionics*, Deferred Prosecution Agreement (Apr. 30, 2018), <https://www.justice.gov/opa/press-release/file/1058466/download>.
 9. Press Release, Dep't of Justice, "Panasonic Avionics Corporation Agrees to Pay \$137 Million to Resolve Foreign Corrupt Practices Act Charges" (Apr. 30, 2018), <https://www.justice.gov/opa/pr/panasonic-avionics-corporation-agrees-pay-137-million-resolve-foreign-corrupt-practices-act>; Press Release, Sec. & Exch. Comm'n, "Panasonic Charged With FCPA and Accounting Fraud Violations" (Apr. 30, 2018), <https://www.sec.gov/news/press-release/2018-73>.
 10. Order Determining Whistleblower Award Claim, File No. 2021-50 (May 19, 2021) ["Award Order"], <https://www.sec.gov/rules/other/2021/34-91933.pdf>; May 19 Press Release, *supra* note 1 (noting that agency awarded "\$28 million in connection with an SEC enforcement action and a related action" (emphasis added)).
 11. Award Order, *supra* note 10.

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The DOJ and SEC actions charged violations of the FCPA arising out of an alleged scheme to use consultants for improper purposes and to conceal payments through third-party sales agents in China and other Asian countries.¹² The SEC also charged both the former CEO and president and the former chief financial officer of Panasonic Avionics with violating federal securities laws,¹³ and entered into separate cease-and-desist orders with both individuals following the settlement with Panasonic Corporation.¹⁴ The SEC's 2018 Order ("Order") stated that "a lucrative consulting position was provided to a government official who assisted [Panasonic] in obtaining and retaining business from a state-owned airline."¹⁵ The underlying investigation became public in 2017, when Panasonic disclosed it to its investors.¹⁶

“[H]eadlines about the Panasonic case and enthusiasm for modern day bounties should not obscure how rare whistleblower awards remain and how delayed payment can be, particularly in the FCPA context.”

According to press reports, the whistleblower was not an employee of Panasonic or Panasonic Avionics.¹⁷ While he or she provided information to the SEC and DOJ that triggered the initial investigation into the company, the allegations made by the whistleblower were related to a region that was *not* the focus of the eventual Order.¹⁸ The subject matters of the enforcement actions were, in fact, based on information self-reported by the company for which the company did not receive any credit,

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12. Sun, *supra* note 2; see also Andrew M. Levine, Bruce E. Yannett, Philip Rohlik, Jil Simon, Andreas A. Glimenakis, "U.S. Reaches Belated Settlements with Dun & Bradstreet and Panasonic", FCPA Update, Vol. 9, No. 10 (May 2018), https://www.debevoise.com/~media/files/insights/publications/2018/05/fcpa_update_may_2018.pdf.
 13. Sun, *supra* note 2.
 14. *In the Matter of Paul A. Margis*, Order Instituting Cease-and-Desist Proceedings, File No. 3-18938 (Dec. 18, 2018), <https://www.sec.gov/litigation/admin/2018/34-84849.pdf>; *In the Matter of Takeshi Uonaga*, Order Instituting Public Administrative And Cease-And-Desist Proceedings, File No. 3-18939 (Dec. 18, 2018), <https://www.sec.gov/litigation/admin/2018/34-84850.pdf>.
 15. At the time of the conduct in question, Panasonic Avionics was negotiating contracts with the airline that were valued at more than \$700 million. According to the SEC, Panasonic ultimately paid the official approximately \$875,000. *In the Matter of Panasonic Corporation*, Order Instituting Cease-and-Desist Proceedings, File No. 3-18459, at 2 (Apr. 30, 2018), <https://www.sec.gov/litigation/admin/2018/34-83128.pdf>.
 16. Sun, *supra* note 2.
 17. *Id.* While there is no requirement that a whistleblower be an insider to the company, 68% of recipients to date have been. Sec. & Exch. Comm'n Ann. Rep. 25 (2020), https://www.sec.gov/files/2020%20Annual%20Report_0.pdf.
 18. Award Order, *supra* note 10, at 2.

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as it did not self-report until after the SEC requested documents.¹⁹ Because the Award Order is heavily redacted, there remain significant questions about the merits and usefulness of the whistleblower's allegations.

SEC Whistleblower Program

The SEC Whistleblower Program was created by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act,²⁰ and provides monetary awards to individuals who provide information related to violations of U.S. securities and other laws enforced by the agency. The law authorizes the SEC to provide monetary awards to individuals who come forward with "high-quality, original information that leads to a Commission enforcement action in which over \$1,000,000 in sanctions is ordered."²¹ The agency has the discretion to award anywhere from 10 to 30% of the money collected in an action, and must weigh a variety of factors to determine whether information provided warrants an award.²²

Since its inception, the program has approved awards to more than 160 individuals for information provided to investigators, and has paid out a total of \$901 million.²³ In 2021 so far, the Commission has paid \$188 million to whistleblowers; a number that exceeds all payments awarded in fiscal year 2020, in which the agency paid \$170 million to 39 individual whistleblowers.²⁴ The SEC has said that it is likely to grant awards to more individuals in 2021 than it did in 2020.²⁵ This seems particularly likely given the broad scope the agency adopted when determining the grounds for an award in the Panasonic case.

Under its governing regulations, the SEC will issue awards to whistleblowers who provide information that leads "to the *successful enforcement* by the Commission of a federal court or administrative action."²⁶ In the Panasonic case, the information appears to have been factually unrelated to the conduct described in the eventual enforcement action,²⁷ and the Award Order expressly notes that

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19. *Panasonic Avionics*, Deferred Prosecution Agreement, *supra* note 8, at ¶ 4(a).

20. See generally 17 C.F.R. § 240.21F.

21. 17 C.F.R. § 240.21F-3; see *Office of the Whistleblower*, *supra* note 3.

22. See 17 C.F.R. § 240.21F-3 (payment of awards); F-4 (other definitions); F-6 (criteria for determining amount of award).

23. Emilie Ruscoe, *Panasonic Whistleblower's SEC Award Exceeds \$28M*, Law360 (May 19, 2021), <https://www.law360.com/articles/1386309/panasonic-whistleblower-s-sec-award-exceeds-28m>.

24. *Id.*

25. *Id.*

26. 17 C.F.R. § 240.21F-3(a) ("[T]he Commission will pay an award or awards to one or more whistleblowers who: (1) voluntarily provide the Commission; (2) with original information; (3) that leads to the successful enforcement by the Commission of a federal court or administrative action; (4) in which the Commission obtains monetary sanctions totaling more than 1,000,000.").

27. See Award Order, *supra* note 10.

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the charges were not based on assistance by the whistleblower.²⁸ The Award Order states that the award was nonetheless warranted because the “company reported similar improprieties in a different geographical region *because of the ongoing ... investigations [prompted by the whistleblower’s information].*”²⁹ The Panasonic award suggests that the SEC is applying a broad interpretation to what may or may not “lead[] to successful enforcement.” As the current rules permit recovery by a whistleblower when their submission “significantly contributes to the success of the action,”³⁰ the SEC appears to be taking the position that being the proximate cause of an investigation constitutes a “significant[] contribution.”

Despite the broad interpretation, the Award Order reveals that the SEC did recognize and account for the limited nexus between the reported information and the ultimate charges – and it appears that the SEC downgraded the size of the award because of it.³¹ Even so, \$28 million is no small sum. The longtime head of the SEC’s whistleblower program, Jane Norberg, stepped down in April,³² and it remains to be seen if the agency will continue to view its criteria for granting awards so broadly. Recent statements by the program’s acting chief, Emily Pasquinelli, indicate it is likely to continue on the same course, at least until a permanent chief is appointed.³³ Furthermore, given the discretion granted to the agency under the governing rules, it has the power to continue to liberally interpret who can receive an award.³⁴

That said, only about 200 of the approximately 7,000 tips submitted to the Office of the Whistleblower each year are FCPA-related, and that number has been consistent since 2017.³⁵ For example, there were 6,900 tips submitted in 2020, and only 208 were FCPA related.³⁶ Given the confidentiality protections

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28. *Id.* at 2 (“[T]he charges were based on information [redaction] and subsequent investigative efforts of the Commission and Other Agency staff and not assistance provided by Claimant . . .”).
 29. *Id.* (emphasis added).
 30. 17 C.F.R. § 240.21F-4 (c)(2).
 31. See Award Order, *supra* note 10, at 2 (“*Because there was not a strong nexus between the Claimant’s information and the Commission’s and Other Agency’s charges, and the charges were based on information [redacted] and subsequent investigative efforts of the Commission and Other Agency staff and not assistance provided by Claimant, a [redacted] percent award appropriately recognizes Claimant’s level of contribution . . .*”) (emphasis added).
 32. Al Barbarino, “SEC’s Whistleblower Chief To Depart After Record-Setting Run”, Law360 (Apr. 8, 2021), <https://www.law360.com/articles/1373560/sec-s-whistleblower-chief-to-depart-after-record-setting-run>.
 33. May 19 Press Release, *supra* note 1.
 34. 17 C.F.R. § 240.21F-6 (criteria for determining amount of award); F-4(c) (defining “information that leads to successful enforcement”); see also Press Release, Sec. & Exch. Comm’n, “SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program” (Sept. 23, 2020), <https://www.sec.gov/news/press-release/2020-219>.
 35. SEC Ann. Rep., *supra* note 17, at 40.
 36. *Id.* at 28.

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surrounding these awards, it is difficult to say how many of those 208 tips resulted in investigations, charges, or eventual awards – but only 39 individuals received monetary rewards from the Office of the Whistleblower in 2020.³⁷

Although it is an open question whether the SEC's expansive interpretation of information that leads "to [a] successful enforcement [action]" – even where the information does not relate to the subject matter of the action – might encourage more whistleblower reports, it is also noteworthy that, in the Panasonic case, it took at least four years (and likely longer³⁸) for the award to be paid.

KARRA and Other NDAA Initiatives

The success of the SEC whistleblower program is likely an important factor in the adoption of similar programs by other agencies. On January 1, 2021, Congress passed, through the NDAA, several provisions that, in conjunction with incentive programs like the SEC's, may increase FCPA and other anti-corruption enforcement in the future – including KARRA, the Corporate Transparency Act, and amendments to the Securities and Exchange Act.³⁹ KARRA is a three-year pilot program, and aims to combat corruption through the use of whistleblower bounties.⁴⁰

KARRA is similar in purpose to the SEC program, but with notable structural differences. Under the pilot program, the Department of Treasury is authorized to pay rewards to whistleblowers who report information that leads to "forfeiture" of "stolen assets linked to foreign government corruption and proceeds of such corruption."⁴¹ Currently, individual awards under KARRA are capped at \$5 million and the program's budget is limited to \$25 million for awards per year.⁴² Awards will be reduced if the

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37. *Id.* at 2.

38. See *Panasonic Avionics*, Deferred Prosecution Agreement, *supra* note 8, at ¶ 4(a) (noting that Panasonic Avionics first became aware of allegations through a whistleblower complaint several years before it reported the information).

39. NDAA §§ 6401–6403, 6501, 9701–9703. The CTA requires companies to disclose beneficial owners and will allow enforcement authorities to better monitor the use of corporate structures to conceal unlawful activity. The amendment to 21(d) of the Securities and Exchange Act will double the statute of limitations on disgorgement claims for scienter-based violations of federal securities laws, including the FCPA.

40. For more information on KARRA, see "Pending U.S. Legislation Will Expand Anti-Kleptocracy Initiative", FCPA Update, Vol. 12, No. 5 (Dec. 2020), <https://www.debevoise.com/insights/publications/2020/12/fcpa-update-december-2020>.

41. NDAA § 9702. "Stolen Assets" is defined as "financial assets within the jurisdiction of the United States, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly from foreign government corruption." *Id.* at § 9703(j)(8).

42. The \$5 million award cap may be adjusted upwards in exceptional circumstances upon request by the Secretary of the Treasury after submission to Congress, NDAA § 9703(e)(2), and the \$25 million budgetary restriction may be lifted via Presidential waiver. NDAA § 9703(d) (3); Matthew Stephenson, "It's Not Just the Corporate Transparency Act: Other Reasons To Welcome the Passage of the U.S. NDAA", Global Anticorruption Blog (Jan. 12, 2021), <https://globalanticorruptionblog.com/2021/01/12/its-not-just-the-corporate-transparency-act-otherreasons-to-welcome-the-passage-of-the-u-s-ndaa/#more-17474>.

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whistleblower participated in the scheme.⁴³ Given these constraints, in theory only five people could receive the maximum award in any given calendar year, yielding much lower numbers than the current SEC program. This difference in award amounts, however, is driven by KARRA's structure relative to the SEC program. In most cases, "forfeited . . . stolen assets" will be returned to its rightful owner, meaning that KARRA rewards will be funded by tax dollars, not by forfeited property. By contrast, SEC whistleblower awards are funded by penalties (including disgorgement) collected from the settling party, rather than taxpayer funds.

Finally, unlike the SEC's Whistleblower Program (which, like the FCPA, focuses on the bribe payers), KARRA rewards whistleblowers for reporting on corrupt foreign officials who *receive* ill-gotten gains – and the tips need not lead to a conviction.⁴⁴

“[I]t is an open question whether the SEC’s expansive interpretation of information that leads ‘to [a] successful enforcement [action]’ – even where the information does not relate to the subject matter of the action – might encourage more whistleblower reports”

Looking to the Future

Given KARRA's limited scope and budget, the likelihood of KARRA leading to a significant number of FCPA-related actions is not high. The Panasonic whistleblower award, however, serves as a reminder to companies of the difficult calculus that goes into a decision of whether to self-report. Whistleblowers are not limited to altruistic global citizens. Whistleblower reports may be threatened as part of business negotiations, or made by disgruntled business partners.⁴⁵ The fact that such reports can lead to an award even when unrelated to the factual predicate of the award provides even greater incentives for current or former employees to become whistleblowers. On the other hand, whistleblower awards are still rare and the

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43. NDAA § 9703(f)(2); Matthew Stephenson, "It's Not Just the Corporate Transparency Act: Other Reasons To Welcome the Passage of the U.S. NDAA", Global Anticorruption Blog (Jan. 12, 2021) <https://globalanticorruptionblog.com/2021/01/12/its-not-just-the-corporate-transparency-act-otherreasons-to-welcome-the-passage-of-the-u-s-ndaa/#more-17474>.

44. NDAA § 9703(b).

45. The SEC has stated that relatively few whistleblower reports come from individuals outside the company at issue. See SEC Ann. Rep., *supra* note 17, at 25.

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Panasonic award appears to have taken four years, or more,⁴⁶ to come to fruition, and the individual was ultimately awarded the minimum amount.⁴⁷

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46. Sun, *supra* note 2.

47. Award Order, *supra* note 10.

2020's Corruption Perceptions Index: Continued Stagnation, COVID Challenges, and FCPA Enforcement

Transparency International (“TI”), the Berlin-based organization with chapters around the world, released its 2020 Corruption Perceptions Index (“CPI”) earlier this year. Not surprisingly, the COVID-19 pandemic is a key focus for the latest CPI and corresponding report. Moreover, a comparison between countries’ recent CPI performance and FCPA corporate enforcement trends reflects that some countries with relatively high scores and companies based in higher-scoring countries continue to be implicated in FCPA resolutions.

TI has been publishing its influential and widely-debated index since 1995. CPI combines 13 surveys conducted by independent institutions and scores approximately 180 countries on a scale of 0 to 100 based on “how corrupt a country’s public sector is perceived to be by experts and business executives.”¹ Scores closer to 100 indicate less perceived corruption. Despite its limitations, the annual survey continues to be a valuable tool for compliance professionals and regulators, as it identifies areas of both improvement and decline, and presents a common and measurable method of benchmarking.²

The 2020 CPI warned that, in addition to “most countries hav[ing] made little to no progress in tackling corruption in nearly a decade,” “more than two-thirds of countries score below 50.”³ Notably, 26 countries have improved their scores since 2012 (when TI updated its methodology and established the 0-100 scale that allows yearly comparisons), 22 countries saw declines, and 132 countries have made “little or no progress in the fight against corruption in recent years.”⁴

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1. “Corruption Perceptions Index 2020: Frequently Asked Questions,” Transparency International, https://images.transparencycdn.org/images/2020_CPI_FAQs_ENv2.pdf; see also Kara Brockmeyer, Andrew M. Levine & David Menon, “2018’s Corruption Perceptions Index Finds Little Progress Against Corruption Globally,” FCPA Update, Vol. 10, No. 7 (Feb. 2019), <https://www.debevoise.com/insights/publications/2019/02/fcpa-update-february-2019>; Andrew M. Levine, Farhana Choudhury & William C. Mattessich, “2016 Corruption Perceptions Index Shows More Decline than Improvement,” FCPA Update, Vol. 8, No. 7 (Feb. 2017), <https://www.debevoise.com/insights/publications/2017/02/fcpa-update-february-2017>.
 2. TI conducts another survey, the “Global Corruption Barometer,” that aims to capture citizens’ experiences. See “Global Corruption Barometer,” Transparency International, <https://www.transparency.org/en/gcb>.
 3. “Corruption Perceptions Index 2020 Report,” Transparency International, https://images.transparencycdn.org/images/CPI2020_Report_EN_0802-WEB-1_2021-02-08-103053.pdf [hereinafter “2020 CPI Report”].
 4. *Id.* at 7.

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Individual and Regional Highlights

Regarding specific countries, there were no changes in performance at the top: Denmark and New Zealand continue to share first place with scores of 88. They are followed by Finland, Singapore, Sweden, and Switzerland, each with a score of 85. South Sudan and Somalia are at the bottom of the 180-country list with scores of 12, followed by Syria (14), Yemen (15), and Venezuela (15).

Maldives showed the most improvement with a score increase of 14, from 29 in 2019 to 43 in 2020.⁵ That moved the country up 55 spots to 75th place. TI praised the country for “advances in democratic space and the removal of several repressive laws.”⁶ Armenia showed the second biggest score improvement with a 7-point increase – from 42 to 49 – putting it in 60th place. According to TI, Armenia deserves credit for taking a “gradual approach to reform, resulting in steady and positive improvements in anti-corruption.”⁷ On the other end of the spectrum, Suriname experienced the biggest year-to-year decline with a drop of 6 points to 38, ranking 94th globally.

Americas

Although some countries in the region made progress, the 2020 CPI had a generally negative outlook for the Americas. The region averaged a score of 43 for the fifth consecutive year, balanced by its top performers Canada (77) and Uruguay (71), and bottom performers Nicaragua (22), Haiti (18), and Venezuela (15).

TI noted that, similar to the other regions, governments in the Americas took extraordinary measures during the pandemic that greatly restricted civil rights.⁸ Colombia (39) and El Salvador (36) were given as examples for “[a]n alarming concentration of power in the executive branches.”⁹ Guatemala declined significantly from its 2012 score, due to reforms threatening the right to information. Ecuador improved its 2012 score by 7 points, following a significant judicial decision sentencing the former President Rafael Correa for accepting bribes.

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5. “Corruption Perceptions Index 2020: Score and rank changes 2019-2020,” Transparency International, https://images.transparencycdn.org/images/CPI_FULL_DATA_2021-01-27-162209.zip.
 6. “CPI 2020: Asia Pacific,” Transparency International (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi-2020-asia-pacific> [hereinafter “Asia Pacific Report”].
 7. “CPI 2020: Eastern Europe & Central Asia,” Transparency International (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi-2020-eastern-europe-central-asia> [hereinafter “Eastern Europe & Central Asia Report”].
 8. See Andrew M. Levine, Ada Fernandez Johnson, et al., “Latin American Anti-Corruption Enforcement: Walking a Tightrope of Challenges and Opportunities,” FCPA Update, Vol. 12, No. 3 (Oct. 2020), <https://www.debevoise.com/insights/publications/2020/10/fcpa-update-october-2020> (noting the region’s diminishing capability to “detect[], punish[], and creat[e] mechanisms to fight corruption”).
 9. “CPI 2020: Americas,” Transparency International (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi-2020-americas>.

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Asia Pacific

The Asia Pacific region continues to host countries on both ends of the spectrum. The region averaged a score of 45, with some highly-ranked jurisdictions like New Zealand (88), Singapore (85), and Australia (77), but also some lower scorers like Afghanistan (19) and North Korea (18).

TI noted that several important players, including India (40), Indonesia (37), and Bangladesh (27), experienced “slow progress” in anti-corruption efforts.¹⁰ Afghanistan was praised for its significant improvement since 2012 and its institutional reforms, including plans to establish a new anti-corruption commission.

“Corruption continues to be a major concern for many countries, including those that perform well in comparative studies, and the 2020 CPI confirms that progress remains slow globally.”

Eastern Europe & Central Asia

This region had the second lowest average score at 36. The 2020 CPI was alarmed by the democratic backsliding that took place across the region during the pandemic, providing “corrupt and authoritarian leaders” with “an excuse to reduce oversight of government spending and curtail civil liberties.”¹¹

TI noted Serbia (where restrictions over access to information were implemented) and Belarus (which was recently determined by the Council of Europe’s anti-corruption body to be “non-compliant” due to failures to implement reforms and recommendations) as countries to watch.

Middle East & North Africa

The 2020 CPI defined the region to be “still perceived as highly corrupt, with little progress made towards controlling corruption.”¹² With an average score of 39, the region includes the United Arab Emirates (71) and Qatar (63) as its top performers, along with Libya (17), Yemen (15), and Syria (14) at the bottom.

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10. Asia Pacific Report, *supra* note 6.

11. Europe & Central Asia Report, *supra* note 7.

12. “CPI 2020: Middle East & North Africa,” Transparency International (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi-2020-middle-east-north-africa>.

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Notably, even the top performers were subject to TI's criticism. Despite not measuring private sector corruption, TI noted that countries like the UAE "often perpetuate corruption elsewhere because of how their private sector is regulated."¹³ TI also observed that a separate report by the Financial Action Task Force highlighted the weaknesses in the country's anti-money laundering framework, pointing to 39 different company registries operating across the country and a vulnerable construction and real estate sector.¹⁴

Sub-Saharan Africa

Sub-Saharan Africa was the lowest performing region of the study with an average score of 32, including the two countries with the lowest scores in the world: South Sudan (12) and Somalia (12).

TI observed that bribery in the region "continues to impede access to basic services," noting that a 2019 survey showed that more than 25% of people in the 35 African countries surveyed reported having paid bribes to access essential services like healthcare.¹⁵ Angola (27), Ivory Coast (36), Ethiopia (38), Senegal (45), and Tanzania (38) were mentioned as having significantly improved since 2012.

Western Europe & European Union

Western Europe and the EU continued to be perceived as having a less corrupt public sector, with an average score of 66 points. Behind the high score were mainly the Scandinavian countries, though TI praised Greece (50) for the "bold reforms" undertaken since 2012.¹⁶

TI also had concerns about the region: it noted that at least 11 EU countries delayed elections due to COVID-19. Malta (53), Poland (56), and Hungary (44) were counted as having significantly declined since 2012. Looking forward, the study noted that the European Public Prosecutor's Office will soon begin investigating and prosecuting crimes committed against the EU budget, such as fraud and corruption.

Links Between Corruption and Disparities in Pandemic Responses

Along with its catastrophic toll on the lives of millions, COVID-19 posed many unique challenges to governments facing a public health crisis on a global scale. Countries have responded with varying degrees of success. The 2020 CPI explained that one reason

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13. *Id.*

14. "The United Arab Emirates: A Key Piece In The Global Money Laundering Puzzle," Transparency International (May 11, 2020), <https://www.transparency.org/en/news/the-united-arab-emirates-a-key-piece-in-the-global-money-laundering-puzzle>.

15. "CPI 2020: Sub-Saharan Africa," Transparency International (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi-2020-sub-saharan-africa>.

16. "CPI 2020: Western Europe & European Union," Transparency International (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi-2020-western-europe-eu>.

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for the disparity might be corruption, which “undermines an equitable response to COVID-19 and other crises, highlighting the importance of transparency and anti-corruption measures in emergency situations.”¹⁷ Emergencies create the “perfect storm” for corruption, given that there are large amounts of money to be distributed as quickly as possible and under considerable risk of improper influence.¹⁸

TI also drew attention to three broader and systematic issues – involving the impact on healthcare, democratic institutions, and government accountability, as described below – that have hindered the responses of countries with lower CPI scores.

Impact on Healthcare

The report observed that countries with higher levels of corruption tend to have lower investment in public health, regardless of their economic development.¹⁹ A comparison between average government healthcare spending and CPI scores between 2012 and 2017 showed that countries with an average score between 66-100 spend, on average, 6.2% of their GDP on public health, while the rate decreases to 3.5% and 1.8% for countries with a score between 34-65 and 0-33, respectively.²⁰

For example, TI noted that Uruguay’s spending on healthcare is “among the highest in the region,” and it has “a robust epidemiological surveillance system,” both of which helped its response to COVID-19 and other infectious diseases.²¹ Uruguay has a CPI score of 71 and is ranked 21st globally (the top performer in Latin America).

On the other hand, Bangladesh – with a score of 26 – is among the lowest scorers on the CPI in Asia Pacific and invests little in healthcare. The country is reportedly experiencing bribery in health clinics and misappropriation in aid distribution, along with misconduct in the procurement of medical supplies and contracts.²² According to TI, corruption, via misconduct in frontline healthcare service delivery, also negatively affects efforts to achieve universal health coverage.²³ In Zambia, access to healthcare “started to shrink after almost ten years of continuous improvements,” accompanying a decline in the country’s CPI score beginning in 2015.²⁴

Continued on page 14

17. 2020 CPI Report, *supra* note 3, at 8.

18. “Why Fighting Corruption Matters In Times of COVID-19,” Transparency International (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi-2020-research-analysis-why-fighting-corruption-matters-in-times-of-covid-19> [hereinafter “COVID and Corruption Analysis”].

19. 2020 CPI Report, *supra* note 3, at 9.

20. *Id.*

21. *Id.*; see Enrique Anarte, “Uruguay Wages Successful Fight Against COVID-19,” Deutsche Welle (Aug. 22, 2020), <https://www.dw.com/en/uruguay-wages-successful-fight-against-covid-19/a-54659839> (noting sustainable investment in the healthcare system that survived periods of political change).

22. 2020 CPI Report, *supra* note 3, at 9.

23. COVID and Corruption Analysis, *supra* note 18.

24. *Id.*

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Impact on Democratic Institutions

TI warned of “democratic backsliding” in the pandemic era, during which countries with higher levels of corruption have had more instances of “[d]emocratic violations in response to COVID-19.”²⁵ TI based this finding on data from the Pandemic Backsliding Project, which studies the “extent to which governments are violating democratic standards for emergency provisions in response to the C[OVID]-19 pandemic.”²⁶ The Project places countries into four categories: those exhibiting “no violations,” “minor violations,” “some violations,” and “major violations.” TI’s analysis showed that countries with:

- *No violations* had an average CPI score of 74;
- *Minor violations* had an average CPI score of 46;
- *Some violations* had an average CPI score of 33;
- *Major violations* had an average CPI score of 36.²⁷

TI highlighted the Philippines (34), where the government’s response to the pandemic has been “characterized by abusive enforcement, and major violations of human rights and media freedom.”²⁸ The United States was another example cited for this worrying trend. A score of 67 in 2020 brought the United States to its lowest position since 2012, following three years of decline in a row. The trend was combined with the “[a]dministration’s challenges to oversight of the unprecedented US\$1 trillion COVID-19 relief package,” which “marked a significant retreat from longstanding democratic norms promoting accountable government.”²⁹ There were also some outliers in this analysis. TI reported that Singapore (85), which ranked among the top five countries for the past three years, undertook “discriminatory measures and restrictions on media freedom” during the pandemic.³⁰

Impact on Government Accountability

TI drew attention to a direct link between the level of transparency in the allocation of resources and the efficiency of crisis responses. As an indicator of transparency, TI analyzed the Open Budget Index, a composite indicator published by the International Budget Partnership measuring “budget transparency, oversight and the extent of public consultation in government spending,” and it found that

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25. 2020 CPI Report, *supra* note 3, at 10.

26. “Pandemic Backsliding,” V-Dem Institute, <https://www.v-dem.net/en/our-work/research-projects/pandemic-backsliding>.

27. 2020 CPI Report, *supra* note 3, at 10.

28. *Id.*

29. *Id.*

30. COVID and Corruption Analysis, *supra* note 18.

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countries with low scores on the CPI also performed poorly on the Open Budget Index.³¹ TI recommended that countries resist the urge to “present transparency and anti-corruption measures as an obstacle to a quick and effective government response,” because “[t]ransparency . . . helps ensure that the resources reach their intended beneficiaries.”³²

While recognizing that countries may need to expedite certain processes to respond quickly in times of crisis, TI cautioned that certain checks need to remain intact “to avoid risking the quality and effectiveness of the response.”³³

CPI Scores and FCPA Enforcement

Although the CPI is a helpful indicator in understanding perceived levels of corruption, it is also important to compare the scores against other risk metrics, including what is happening in practice. In this regard, an analysis of recent FCPA corporate enforcement actions provides helpful context.

“[A] country’s high CPI score does not necessarily mean that companies headquartered within its borders are automatic models of anti-corruption compliance, particularly when operating in countries with lower CPI scores.”

First, do countries that are mentioned frequently in FCPA enforcement actions as locations where misconduct occurred all have poor CPI scores? Most do, but not all. There are nine countries that have been mentioned at least three times in FCPA corporate enforcement actions between 2018 and 2021 (year-to-date). China leads the group with 19 appearances, followed by Brazil with 11. China and Brazil have low 2018-2020 CPI score averages of 41 and 36, respectively. It is also true that the group’s combined average score is low at 41.9. However, not every country exhibits a CPI score below 50, a threshold used by TI in its reporting. For example, South Korea has been mentioned as the location of misconduct in four recent FCPA enforcement actions, but the country’s average CPI score is 59. Similarly, Saudi Arabia had four appearances in recent enforcement actions, even though its average CPI score is 52.

Continued on page 16

31. *Id.*

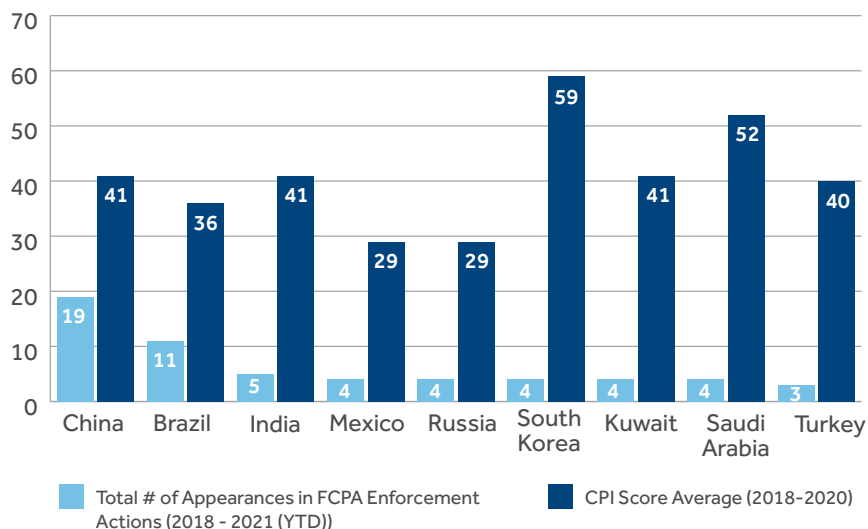
32. *Id.*

33. *Id.*

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CPI Scores of Countries with the Most Frequent Appearances in FCPA Enforcement Actions (2018-2021)



The above figures suggest that, with respect to FCPA enforcement actions, the countries where bribes are paid frequently have relatively poor CPI scores, but it is not always the case. In addition, some countries with significantly worse average scores have appeared in resolutions much less frequently than one might expect. For example, each of Syria and Yemen – with average scores of 13 and 15, respectively – has been mentioned in only one enforcement action within the past three years. Given the relatively large number of lower scores across the board, the CPI arguably does not offer substantial predictive power in determining where actionable misconduct may take place.

Second, are there any FCPA enforcement actions concerning the payment of bribes in countries with top CPI scores? There appear to have been *no* corporate enforcement actions brought in connection with bribes paid in the top twenty scorers in the past five years. But observers have rightly drawn attention to the fact that companies headquartered in “clean countries” have nevertheless been responsible for a significant portion of all FCPA settlements – as illustrated by the substantial settlements by the Swedish telecom giants Ericsson and Telia. And in 2020, two companies headquartered in Switzerland – a country with a score of 85 (5th overall) – resolved FCPA actions.³⁴

Continued on page 17

34. In June 2020, Novartis AG and two subsidiaries agreed to pay DOJ and the SEC \$346.7 million in penalties and disgorgement. United States Dep’t of Justice, Press Release No. 20-589, “Novartis AG, Novartis Hellas S.A.C.I., and Alcon Pte Ltd Agree to Pay over \$345 Million Combined to Resolve FCPA Matters with the Government” (June 25, 2020), <https://www.justice.gov/opa/pr/novartis-hellas-saci-and-alcon-pte-ltd-agree-pay-over-233-million-combined-resolve-criminal>. Then in December 2020, Vitol Inc. – the U.S. affiliate of the Swiss-based Vitol group – entered into a DPA and agreed to pay \$135 million in total fines. United States Dep’t of Justice, Press Release No. 20-1310, “Vitol Inc. Agrees to Pay over \$135 Million to Resolve Foreign Bribery Case” (Dec. 3, 2020), <https://www.justice.gov/opa/pr/vitol-inc-agrees-pay-over-135-million-resolve-foreign-bribery-case>.

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Hence, a country's high CPI score does not necessarily mean that companies headquartered within its borders are automatic models of anti-corruption compliance, particularly when operating in countries with lower CPI scores. At the same time, it is also possible that companies headquartered within higher-scoring jurisdictions are subject to increased scrutiny, especially because their home countries may have stronger cooperative relationships with U.S. enforcement authorities.

When using the CPI in practice, it is both where the companies are based and where they are operating that matter from a risk perspective, among other factors. As TI acknowledges, even a high CPI score does not shield a country or its companies from corruption.³⁵ Actual FCPA enforcement activity – driven in part by the SEC's and DOJ's continued comfort investigating particular misconduct in certain jurisdictions and by increased coordination and relationship-building with non-U.S. counterparts – remains a critical risk metric for companies operating abroad.

Conclusion

Corruption continues to be a major concern for many countries, including those that perform well in comparative studies, and the 2020 CPI confirms that progress remains slow globally. In addition, corruption during the era of COVID has had devastating effects on the health of many communities and their institutions.

TI's study emphasizes that public health crises and corruption can create vicious cycles that allow the two to feed off each other. The cycle can inflict structural harm on governance, as seen in the examples of countries that have used the pandemic as an excuse to curtail transparency, accountability, and civil liberties. As the world moves past the pandemic, it is essential for countries and companies to improve their anti-corruption efforts, lest the challenges of the pandemic give rise to facts that underpin FCPA investigations for years to come.

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35. See "CPI 2020: Trouble At The Top – An Analysis," Transparency International (Jan. 28, 2021), <https://www.transparency.org/en/news/cpi-2020-trouble-at-the-top> (noting that "[e]ven countries that perform well in the [CPI] have their own integrity challenges").

FCPA Update

FCPA Update is a publication of
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