

FCPA Update

A Global Anti-Corruption Newsletter



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Anti-Corruption Q&A With Andrew Ceresney, Former SEC Director of Enforcement

Andrew J. Ceresney, a partner in the New York office of Debevoise & Plimpton LLP, served as Director of the Division of Enforcement at the U.S. Securities and Exchange Commission from 2013 to 2016.

FCPA Update: Looking back over your nearly four years as Director of Enforcement at the SEC, from your perspective, what were the most significant changes in how the SEC approached enforcement of the Foreign Corrupt Practices Act (“FCPA”)?

Andrew J. Ceresney: During my time at the SEC, the FCPA was a major focus of ours and an important priority among a number of other priorities. I think we stepped up and did a number of things in the FCPA arena that were different from the past. First, we increased our focus on self-reporting and cooperation, making it clear what benefit companies would derive from those things.

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SEC Director of Enforcement**

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That initiative included cases in which we gave significant credit on penalties, in some cases resulting in no penalties, and other cases in which we gave significant credit for cooperation, including by means of declinations and non-prosecution agreements. I hope the message got through loud and clear that there would be benefits in terms of charging decisions and penalties from self-reporting and cooperation.

Second, we increased our collaboration with other international regulators and began bringing cases in conjunction with those regulators, which I think was a significant development.

Third, as in other areas of enforcement, we continued to focus on bringing cases against individuals, and I think we were pretty successful in that area over my tenure. What we accomplished was a tribute to the great and talented people in the Enforcement Division as a whole, and the FCPA unit as well, who are so committed to the mission of the SEC.

FCPA Update: In response to those initiatives, have you seen companies responding differently to investigations in this area?

Mr. Ceresney: Yes, my sense is that most companies now realize that self-reporting is often in their interest. I always said when I was Director that companies were gambling if they decided to not to self-report. I think that generally remains true.

Obviously, there are many factors that go into that decision, but I do think one of the important factors has to be the existence of the whistleblower program, and the fact that the SEC can find out about conduct from other sources if a company does not alert the government to the issue.

FCPA Update: There has been talk about the future of the whistleblower program. Do you have any forecasts on what the future holds for whistleblowers, with regard to FCPA matters or otherwise?

Mr. Ceresney: I think the whistleblower program has been a tremendous success. First, look at the number of awards that have been given out in the very short existence of the program. And that's with a long lead time for investigations. The program has awarded over \$140 million for tips that led to successful enforcement actions. I think that's an indication of some of the success.

There are also hundreds of investigations that are ongoing that have been started or otherwise advanced through whistleblowers. I have called the impact of the whistleblower program transformative, and I think that remains the case. My sense is that anyone looking at it would conclude the same and therefore would not do anything to fiddle with that.

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FCPA Update: You also mentioned increased coordination with regulators of other countries. During the time that you were Director, what was the SEC's approach to working with authorities in other countries, including where they had already begun an investigation or where much of the evidence and the focus of the events at issue were in other countries?

Mr. Ceresney: I think the SEC did a much better job of coordinating investigations and also resolutions with other countries. Obviously, a lot of the challenge in the FCPA area is obtaining evidence that's overseas. That is facilitated often by cooperation from companies, but also by the involvement of foreign regulators who have easier access in many cases to that information.

So during my tenure as Director, we developed close relationships with those foreign regulators, and we were able to share information and evidence with them. And then when it came time for settlement, we often would sit down together with the other side and the foreign regulator and negotiate a settlement which took into account the overall conduct and made sure that we didn't double-count that conduct in determining the appropriate penalty.

“[The trend of international cooperation] will undoubtedly continue and expand. I think you're going to see more and more countries enforcing their local anti-bribery laws. And I think you will see much more cooperation between the U.S. and those other countries.”

FCPA Update: The last year has seen a number of major FCPA resolutions involving enforcement authorities in multiple countries, coordinating not just with regard to investigation but also with regard to resolution. Should companies expect that this trend of international cooperation in anti-corruption enforcement will continue?

Mr. Ceresney: I think it's a trend that will undoubtedly continue and expand. I think you're going to see more and more countries enforcing their local anti-bribery laws. And I think you will see much more cooperation between the U.S. and those other countries. I think this is a great development.

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Many of the arguments against the FCPA over the years have been that the U.S. was in a difficult competitive position because other countries didn't enforce their anti-corruption laws. With other countries now enforcing such laws, I think it eliminates that argument. And I think it becomes a much better environment to enforce anti-bribery laws.

FCPA Update: Some commentators have characterized the SEC's enforcement of the FCPA's accounting provisions as imposing a virtual strict liability standard for companies. How should companies think differently about the potential risk of civil liability under the accounting provisions relative to their other legal risks under the FCPA?

Mr. Ceresney: I don't think that there is strict liability in that sense. The SEC typically won't go after immaterial violations in which there is no indication of bribery. I think the internal controls and books and records provisions of the FCPA are critical provisions. Public companies really have an obligation to make sure that their books and records are accurate and that there are controls on accounting aspects and other aspects of those books and records.

And so I think the SEC's work in that area has been very important. I think it sent the message loud and clear that companies need to focus on this, and I think in the FCPA arena in particular, it does have a tremendous impact because the focus on compliance has really increased in the business community.

FCPA Update: The mantra in the world of anti-corruption compliance advice in the business community as well as in much of the guidance from the U.S. enforcement agencies has been that compliance procedures should be risk-based. Based on your experience, what areas of business activity tend to present the greatest risks?

Mr. Ceresney: I think that it has probably not changed over the last five years. Areas of risk include partnerships with joint venture partners, minority ownership interests in particular businesses, and third parties who are retained to assist with obtaining contracts. Expenses continue to be an area of focus – entertainment expenses and the like. The SEC has had a number of cases in that area.

Transactions are important. So acquisition-related due diligence is very important, and I think that's been an area of focus for lots of companies. Those are the areas that I would say are the most risky.

FCPA Update: Are there particular industries or markets that you see as particularly ripe for increased scrutiny, and possibly increased enforcement activity?

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Mr. Ceresney: During my tenure as Director, the SEC did a lot in the pharma space. There was a big focus on pharma, particularly in China and in some other countries with public healthcare systems. So that was an important area and probably remains a focus.

Financial institutions became a focus and will remain a focus. The Bank of New York case that the SEC brought was the first FCPA case against a financial institution, and there have been others since. I think that will continue to be a focus.

Hiring practices remain an issue more broadly. The SEC brought a number of cases arising from hiring practices. I think there will be more coming down the pike.

FCPA Update: One criticism of FCPA enforcement by both the SEC and the DOJ is that investigations simply take too long even when companies fully cooperate. During your time at the SEC were steps taken to speed up investigations, especially involving evidence or witnesses outside the U.S.? Where do you see room, if you do, for further changes in that area?

Mr. Ceresney: This is an area we tried to focus on. The SEC really is sensitive to the fact that investigations take a while.

That often is related to a number of things, including the difficulty of conducting these investigations, the fact that evidence often is remote and more difficult to get, and simply the scope of some of these investigations. So many times the pace of the investigation is outside the SEC's control.

But with regard to things within the SEC's control, we tried to expedite the investigation as quickly as we could and when we could resolve investigations speedily, we did. This was part of a larger focus that I had when I was Director on efficiency. I truly believed, and I tried to message this internally, that bringing cases more quickly is much more effective in terms of deterrence. When conduct has aged, it has less deterrent effect when you bring the case. I think overall that the SEC was better at bringing cases more quickly than it had been in the past.

FCPA Update: Lastly, let's turn to a topic that has generated a lot of discussion recently, which is how the new administration may approach enforcement of the FCPA. President Trump has criticized the FCPA in the past. There have been some reports suggesting that this administration may prioritize other areas of enforcement possibly at the expense of this area. What changes do you foresee, if any, with regard to FCPA enforcement by either agency under this new administration?

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Mr. Ceresney: I don't foresee many changes in FCPA enforcement. My sense is that Jay Clayton, who is a very talented and intelligent lawyer and will be a strong leader, recognizes that the SEC's work in the FCPA area is important.

I am pretty confident that the SEC, which has on its staff people with significant expertise and experience with FCPA cases, will continue with the same general approach to FCPA cases as we have seen in recent years.

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DOJ Issues Guidance on Evaluating Corporate Compliance Programs

On February 8, 2017, the United States Department of Justice (“DOJ”) issued guidance on the “Evaluation of Corporate Compliance Programs” (the “Compliance Evaluation Guidance”).¹ Expressly described as “neither a checklist nor a formula,” the Compliance Evaluation Guidance presents a series of “Sample Topics and Questions” relating to eleven aspects of a compliance program. In deciding whether to charge a business organization, the DOJ asks these “common questions” regarding an organization’s pre-existing compliance program and its remedial efforts.²

As the Compliance Evaluation Guidance notes, these topics and questions are not new. But the Compliance Evaluation Guidance provides added clarity on the DOJ’s approach with regard to evaluating corporate compliance programs and likely will be a useful tool for many compliance professionals. At the same time, this document raises some questions about the DOJ’s approach.

The Context of Evaluating a Compliance Program

The Compliance Evaluation Guidance begins by noting that it addresses two of the ten Filip Factors: the robustness of a pre-existing compliance program and improvements to the compliance program as part of remediation.³ These are two different factors, but the sample topics and questions in the Compliance Evaluation Guidance do not clearly differentiate between them.

Echoing the 2012 Resource Guide,⁴ the Compliance Evaluation Guidance notes that there is no “rigid formula” to assess the effectiveness of a compliance program. Different companies face different risks, “warrant[ing] particularized evaluation.” While the 2012 Guidance provided helpful information about “aspects of compliance programs that the DOJ and SEC assess,”⁵ the Compliance Evaluation Guidance offers

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1. United States Department of Justice, Criminal Division, Fraud Section, “Evaluation of Corporate Compliance Programs,” <https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/compliance-initiative>. A link to the Compliance Evaluation Guidance does not appear in the FCPA section of the DOJ website, but on the Strategy and Policy section.
 2. United States Department of Justice, “United States Attorneys Manual” §§ 9-28.300, 9-28.800, 9-29.1000. The existence and effectiveness of a pre-existing compliance program and improvements to a compliance program are factors five and seven in what are commonly referred to as the “Filip Factors” which the DOJ uses in making corporate charging decisions. <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.
 3. Compliance Evaluation Guidance at 1.
 4. United States Department of Justice and Securities and Exchange Commission, “A Resource Guide to the Foreign Corrupt Practices Act” at 57 (2012) (“Individual companies may have different compliance needs depending on their size and particular risks associated with their businesses, among other factors.”).
 5. *Id.*

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more insight into how the DOJ views compliance programs in the context of criminal investigations. As would be expected, a compliance program is “evaluated in the specific context of a criminal investigation.” The questions included make clear that evaluation is carried out with respect to the particular misconduct being investigated, and not simply in terms of benchmarking against objective criteria. Indeed, of the forty-six subtopics that comprise the Compliance Evaluation Guidance, more than half (twenty-four) refer to “the misconduct at issue,” “the misconduct in question,” or similar phrases.

The “Sample Topics and Questions”

The Compliance Evaluation Guidance covers eleven topics, which are slightly different than those listed in the 2012 Guidance:⁶ (i) Analysis and Remediation of Underlying Misconduct; (ii) Senior and Middle Management; (iii) Autonomy and Resources; (iv) Policies and Procedures; (v) Risk Assessment; (vi) Training and Communications; (vii) Confidential Reporting and Investigation; (viii) Incentives and Disciplinary Measures; (ix) Continuous Improvement, Periodic Testing and Review; (x) Third Party Management; and (xi) Mergers and Acquisitions. These are further divided into 46 subtopics comprised of a series of usually two or more questions of the type asked by the DOJ in assessing each subtopic, totaling nearly 120 questions.

As the subject areas of the sub-topics and questions are not entirely new, this article provides an overview of each, and otherwise highlights key or sometimes overlooked issues.

1. Analysis and Remediation of Underlying Misconduct includes three subtopics: root cause analysis, prior indications, and remediation. This topic was not covered in the 2012 Guidance. It should be of particular interest to compliance professionals. It makes clear that companies pursuing DOJ resolutions must analyze the root cause of any misconduct and the reasons opportunities to prevent it were missed. Remediation should be based at least in part on that analysis.
2. Senior and Middle Management includes three subtopics: conduct at the top, shared commitment and oversight. As the title of the topic makes clear an analysis of “tone at the top” includes both the commitment by senior management and how that commitment is transmitted through the ranks. Two specific questions confirm that, in the context of a potential

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6. *Id.* at 57-62. The 2012 Guidance topics were: (i) Commitment from Senior Management and a Clearly Articulated Policy Against Corruption; (ii) Code of Conduct and Compliance Policies and Procedures; (iii) Oversight, Autonomy, and Resources; (iv) Risk Assessment; (v) Training and Continuing Advice; (vi) Incentives and Disciplinary Measures; (vii) Third-Party Due Diligence and Payments; (viii) Confidential Reporting and Internal Investigation; (ix) Continuous Improvement: Periodic Testing and Review; and (x) Mergers and Acquisitions.

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DOJ resolution, this topic is broader than merely a communications strategy: (1) “How have senior leaders, through their words and actions, encouraged or discouraged the type of misconduct in question?” and (2) “what compliance expertise has been available on the board of directors?” The Compliance Evaluation Guidance contains no further indication of the DOJ’s expectations, but the DOJ is clearly interested in how senior management might have encouraged misconduct as well as whether the board has compliance expertise.

“Most of the Compliance Evaluation Guidance will not be new to those who carefully follow FCPA developments. But it provides a useful roadmap regarding how the DOJ will assess a compliance program in the context of a criminal investigation. It also raises several questions.”

3. Autonomy and Resources includes seven subtopics: compliance role; stature; experience and qualifications; autonomy; empowerment; funding and resources; and outsourced compliance functions. The related set of 24 questions will be of particular interest to professionals. This section of the Compliance Evaluation Guidance goes beyond the compliance function to include “compliance or relevant control functions (e.g., Legal, Finance, or Audit).” Moreover, the questions make clear that people are as important as funding, specifically asking “what has been the turnover rate for compliance ... personnel?” The set of six questions associated with “outsourced compliance functions” also underscores that a company retains significant responsibility for any decision to outsource all or part of its compliance functions.
4. Policies and Procedures includes nine subtopics divided into two groups, design and accessibility and operational integration. The nine subtopics are: designing compliance policies and procedures; applicable policies and procedures; gatekeepers; accessibility; responsibility for integration; controls; payment systems; approval/certification process; and vendor management. This section goes far beyond a list of policies and their dissemination. The questions suggest that more than imposing a good policy is required. Instead, the business must be consulted about the draft policy and later involved in its integration. The subtopic “gatekeepers” specifies that certain

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employees in roles relating to, for example, issuing payments or reviewing approvals, should receive special guidance.

5. Risk Management includes three subtopics: Risk Management Process, Information Gathering and Analysis and Manifested Risks. As elsewhere, the questions associated with this topic focus primarily on the specific type of misconduct being investigated.
6. Training and Communications includes four subtopics: risk-based training; form/content/effectiveness of training; communications about misconduct; and availability of guidance. The subtopic “Risk-Based Training” reflects that training for employees in relevant controls functions and high risk employees should be tailored to their function or risk.
7. Confidential Reporting and Investigation includes three subtopics: effectiveness of the reporting mechanism; properly scoped investigation by qualified personnel; and response to investigations. The Compliance Evaluation Guidance makes clear that investigations should not only determine whether misconduct has occurred, but also should be used to “identify root causes, system vulnerabilities, and accountability lapses.”
8. Incentives and Disciplinary Measures includes four subtopics: accountability; human resources process; consistent application; and incentive system. Most of the questions related to this topic are straightforward. But note that the DOJ asks “[d]id the company’s response consider disciplinary action for supervisors’ failure in oversight?” without regard to whether or not the supervisor was involved in the misconduct.
9. Continuous Improvement, Periodic Testing and Review includes three subtopics: internal audit; control testing and evolving updates. Most of the related questions will not be new to compliance professionals. One question, however, suggests that one purpose of a compliance review is to make sure a company is not overdoing compliance by instituting policies that don’t apply to parts of their business. Specifically, companies should ask “whether policies/procedures/practices make sense for particular business segments/subsidiaries?”
10. Third Party Management: includes four subtopics: risk-based and integrated process; appropriate controls; management of relationships; and real actions and consequences. As third parties are the most common cause of enforcement actions, the risks associated with third parties and possible procedures for reducing those risks are comparatively better known.

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The first question under appropriate controls is particularly important in evaluating third parties, but quite often overlooked, namely, “what was the business rationale for the use of the third parties in question?”

11. Mergers and Acquisitions includes three subtopics: due diligence process; integration in the M&A process; and process connecting due diligence to implementation. In the FCPA context, the M&A process has been examined at length in a series of enforcement actions and in particular in the DOJ’s Opinion Release 08-02 (the Halliburton opinion) and 14-02. The Compliance Evaluation Guidance reconfirms these opinion releases, emphasizing the importance of compliance due diligence, implementation of an effective compliance program at the target and post-transaction monitoring of risks identified in the due diligence process.

Questions about the DOJ’s Approach

Most of the Compliance Evaluation Guidance will not be new to those who carefully follow FCPA developments. But it provides a useful roadmap regarding how the DOJ will assess a compliance program in the context of a criminal investigation. It also raises several questions.

First, is it really appropriate or fair to focus so much on “the misconduct at issue?” In terms of evaluating the effectiveness of an existing program, focusing on specific misconduct puts a heavy thumb on the scale of finding deficient what might otherwise be a best-in-class program. This tendency potentially results in an assessment grounded in hindsight rather than one based on objective factors. We have noted in the past that this is a risk associated with enforcement of the FCPA’s internal controls provisions.⁷ The fact that misconduct occurred almost necessarily means that something else could have been done, but that does not mean that DOJ should not consider more generally the excellence of a company’s compliance program and reward such investment.

Second, and relatedly, evaluating an existing compliance program and remediating a specific instance of misconduct are not the same exercise, but they are not clearly delineated in the Compliance Evaluation Guidance. The focus on “the misconduct at issue,” risks encouraging companies to “fight the last war,” focusing on instituting procedures to prevent past behavior rather than focusing on emerging threats.

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7. See, e.g., Paul R. Berger, Andrew M. Levine, Bruce E. Yannett, and Philip Rohlik, “SEC Brings First FCPA Enforcement Actions of 2016,” FCPA Update, Vol. 7, No. 7 (Feb. 2016); Colby A. Smith, Andrew M. Levine, and Philip Rohlik, “Charitable Donations as FCPA Violations: SEC Settles with Nu Skin Over Donation by Chinese Subsidiary,” FCPA Update, Vol. 8, No. 2 (Sept. 2016) (“more often, as we have noted, the existence of an improper payments is taken as ‘evidence’ that controls were insufficient, citing controls that, had they been in place, might have prevented the payments.”).

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Third, the Compliance Evaluation Guidance consists of eleven topics, forty-six subtopics and nearly 120 questions, which expressly are samples of the types of questions that the DOJ could ask in the context of a criminal investigation. As the document notes, “[i]n any particular case, the topics and questions ... may not all be relevant, and others may be more salient given the particular facts at issue.” The Compliance Evaluation Guidance, therefore, will be of great use to companies preparing to report to the DOJ. It is less clear how useful the Compliance Evaluation Guidance will prove to be in other contexts.

As part of evaluating an existing compliance program (outside of the reporting context) it would certainly be useful for a Chief Compliance Officer (or other company representative) to consider many of these questions and the likely answers. Of course, completing this exercise in a systematic way would require some dedication of time and resources, and the absence of additional DOJ commentary likely would result in some frustration in a company’s trying to evaluate the appropriateness of its answers. It is also potentially significant in this context that the DOJ published the Compliance Evaluation Guidance on the Compliance Initiative portion of its website and not the FCPA portion. Although the Compliance Evaluation Guidance acknowledges at the outset that an effective compliance program must be particularized, there is the risk that these nearly 120 questions may imply for some that the definition of an effective compliance program has perhaps become too complex for all but the largest and best-resourced companies.

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2016 Corruption Perceptions Index Shows More Decline than Improvement

Transparency International recently released its 2016 Corruption Perceptions Index (“CPI”) and accompanying analysis of corruption in each of five designated regions of the world. The CPI measures how much public-sector corruption is perceived in 176 countries and territories based on international surveys of experts. These surveys examine local governance, economic and investment risk, executive opinion, government accountability, and the implementation of effective anti-corruption initiatives.¹ 2016 saw the addition of eight new territories to the Index, which formerly contained only 168 countries.

The CPI helps anti-corruption and compliance professionals, including by keeping the issue of corruption in the public discourse, highlighting the status of anti-corruption efforts across the globe, and providing a useful roadmap for identifying next steps in tackling corruption. Enforcement agencies may expect multinational corporations to use the CPI as one input in connection with risk assessments, providing further incentives to stay abreast of developments in the CPI. The drawbacks of the CPI come from the nature of its survey-based methodology – it measures the perception of corruption rather than attempting to quantify actual instances of corruption. This methodology may fail to account for the incidence of less-apparent corruption in a country, and it may also fail to account for actions taken to address corruption but which are not yet publicly known.

Transparency International highlighted several significant corruption-related events in 2016 that may influence anti-corruption efforts in the future. The ouster of South Korean President Park Guen-Hye, the investigation of former Argentinian President Christina Fernandez de Kirchner, and the indictment of the Chilean President’s daughter-in-law, all on the basis of alleged corruption, indicate some measure of accountability for prominent officials in each of those countries. Significant governmental changes in Thailand and Myanmar likewise raise the prospect of improvement in those historically corruption-prone jurisdictions.

The highest-ranked countries on this year’s CPI were concentrated in Scandinavia, Western Europe, and Oceania. Denmark and New Zealand tied for first place in the CPI, with Finland coming in third, followed by Sweden, then Norway. Singapore was the lone Asia Pacific country in the top 10, coming in 7th, and Canada was the

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1. See Transparency International, “Corruption Perceptions Index 2016, Source Description,” http://files.transparency.org/content/download/2056/13236/file/CPI_2016_SourceDescriptionDocument_EN.pdf.

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sole country from the Americas region in the top 10, placing 9th. The United States fell two places this year, from 16th to 18th.² Somalia, ranked 176th, was the lowest ranked country on this year's CPI, just as it was in 2015.³ Notably, Afghanistan (169th) saw its score jump 4 points, from 11 in 2015 to 15 in 2016, causing it to pass Libya, Sudan, South Sudan, Yemen, and Syria in the rankings.⁴

Transparency International's 2016 Corruption Perceptions Index indicated a global corruption landscape that still presents many challenges for people and institutions. This year, more countries declined than improved in the Corruption Perceptions Index score. Over two-thirds of the countries and territories in the index fall below 50 on the corruption scale, on which a score of 0 is "highly corrupt" and 100 is "very clean."⁵ No state or territory received a perfect score.

The results of this year's CPI illustrate the connection between corruption and inequality, Transparency International noted. In many countries, the majority of the state's citizens live in poverty while corruption reinforces the power of the wealthy. This connection between corruption and inequality is identified by Transparency International as a factor in the rise of populist leaders across the world.

The Middle East and North Africa regions experienced the most significant decline in 2016, and the Sub Saharan Africa and Asia Pacific regions also performed poorly, though their declines were not as drastic. Transparency International cited a lack of oversight, low accountability, and an insufficient commitment to democracy as the causes of the low scores in these regions. The Europe and Central Asia region remained relatively stable in its scores, though it experienced a slight decline. The Americas region was highlighted positively in this year's report due to a number of high-profile efforts to tackle corruption, but Transparency International stressed that overall performance on the Index in this region remains poor.

Regional Breakdown of Scores and Rankings

The 2016 CPI is based on data for each country, as in prior years, and offers a region-by-region comparison based on the average score of each individual country within a region.⁶ Although there are inherent limitations in attempting to draw conclusions from differences in survey results from one year to the next, several patterns emerge.

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2. Transparency International, "Corruption Perceptions Index 2016" (2016), http://www.transparency.org/news/feature/corruption_perceptions_index_2016 [hereinafter "CPI 2016"].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

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(i) Americas

Transparency International was optimistic about the highly publicized efforts to expose and tackle corruption in the Americas in 2016, writing that “2016 was a good year in the fight against corruption in the Americas.”⁷ The report noted that governments in the Americas still have a long way to go, however. The average score for the Americas on the Corruption Perceptions Index was 44 out of 100.⁸ Transparency International noted that even where corruption is being addressed in the region, the risk remains that this is the result of the efforts of a small group of individuals rather than a comprehensive, long-term plan.⁹

“The Middle East and North Africa regions experienced the most significant decline in 2016, and the Sub Saharan Africa and Asia Pacific regions also performed poorly, though their declines were not as drastic.”

Several corruption investigations took place in the Americas in 2016 that are among the largest in size and scope of anywhere in the world. The Panama Papers exposed a vast network of shell companies used by wealthy individuals around the world to hide illicit funds. The multi-billion-dollar settlement involving Brazilian companies Odebrecht S.A. and Braskem S.A. was the largest penalty ever in a foreign bribery case.¹⁰ Along with this settlement, the U.S. Department of Justice and the SEC have continued their cooperation with Brazilian prosecutors on investigations involving Petroleo Brasileiro S.A. (Petrobras). Regulators also continued to investigate FIFA, cooperating not only with prosecutorial authorities in the Americas but also in Europe. Public investigations of prominent officials also appeared in the headlines this year, as noted above given that the Chilean president’s daughter-in-law faced corruption charges,¹¹ and an investigation began of former Argentinian President Cristina Fernandez de Kirchner.¹²

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7. CPI 2016, Region Analysis, “The Americas: Sometimes Bad News is Good News,” http://www.transparency.org/news/feature/americas_sometimes_bad_news_is_good_news [hereinafter “The Americas”].

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

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There was not all good news for anti-corruption efforts in the Western Hemisphere. Nicaragua fell from 130th to 145th, and Guatemala fell from 123rd to 136th. The United States fell slightly from 16th to 18th, its score dropping from 76 to 74. The largest decline in the region was in Mexico, which experienced multiplying corruption scandals and the lowest approval rating ever for the Mexican president. Mexico dropped to 123rd from 95th, and its score dropped from 35 to 30.¹³

Venezuela, ranked 166th globally with a score of 17, is the lowest scorer in the Americas, and Transparency International noted that hundreds of thousands of citizens protested against the government in 2016.¹⁴ Canada remained the highest-scoring state in the region, ranking 9th on this year's CPI with a score of 82.¹⁵

(ii) *Asia Pacific*

The Asia Pacific states performed relatively poorly in this year's Corruption Perceptions Index, which Transparency International attributed to "unaccountable governments, lack of oversight, insecurity, and shrinking space for civil society."¹⁶ Nineteen out of thirty countries in the region scored 40 or less out of 100. Governments in Afghanistan, Myanmar, and the Philippines have made recent, public commitments to tackling corruption in their countries, and Transparency International plans to observe these states in 2017 to see if corruption is reduced.

Afghanistan (169th), Timor-Leste (101st), Laos (123rd), and Myanmar (136th) were bright spots of marginal improvement in the Asia Pacific region in 2016. Afghanistan has moved up four points in its score, to 15, and its score nearly doubled that of 2013.¹⁷ Afghanistan's score increase may indicate that some progress is being made on the National Unity Government's anti-corruption commitments. Transparency International emphasized that in spite of Myanmar's modest improvement in 2016, the violence in Rakhine State in 2016 remains troubling and indicates a lack of military oversight.

China's score increased, but it remains poor, at 40. China (79th) has focused its anti-corruption efforts on catching "tigers and flies" – corrupt public officials big and small.¹⁸ Transparency International recommends a holistic approach to fighting corruption in China which involves civil society as well as the private sector.

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13. CPI 2016; CPI 2015.

14. The Americas.

15. CPI 2016.

16. CPI 2016, Region Analysis, "Asia Pacific: Fighting Corruption is Sidelined," http://www.transparency.org/news/feature/asia_pacific_fighting_corruption_is_side_lined [hereinafter "Asia Pacific"].

17. *Id.*

18. *Id.*

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India (79th) received a score matching China's, at 40. Transparency International noted that this reemphasizes India's inability to deal effectively with both petty and large-scale corruption.

Australia's performance in the index, while relatively strong given its ranking of 13th, has been recently limited by foreign bribery scandals and threats to independent institutions in Australia, such as attacks on the president of the Australia Human Rights Commission following an AHRC report documenting abuse in asylum seeker detention centers.

Thailand (101st) and South Korea (52nd) experienced declines in their 2016 scores. Thailand's score dropped to 35 following recent political upheaval. The CPI report cites the new military junta's suppression of debate and prohibition of monitoring the constitutional referendum.¹⁹ South Korea's score dropped from 56 to 53, a decline which Transparency International attributes to President Park Guen-Hye's impeachment for corruption.²⁰

North Korea and Cambodia are at the bottom of the Asia Pacific region. North Korea ranks 174th on the global list, with a score of 12.²¹ This is a four point improvement from North Korea's 2015 score, which puts it above only Sudan and South Sudan on the global CPI ranking. The lowest-ranked South East Asian country is Cambodia, with a score of 21, ranking 156th in the world.²²

(iii) *Europe and Central Asia*

There were few drastic changes in Europe and Central Asia in this year's index. The region was marked by stagnant or declining scores for a majority of the fifty countries in Europe and Central Asia featured in the 2016 CPI. Only fifteen countries, half as many as the year before, achieved higher scores compared to 2015, including Italy, Slovenia, Montenegro, Serbia, Ukraine, Albania, and Belarus with the largest improvement from a score of 32 to 40 and rising significantly from 107th to 79th overall.²³

This region is typically characterized by two groups of countries: one consisting of Western Europe and the European Union ("EU"), with an average score in 2016 of 66 (23 points higher than the global average); and a second group consisting of Eastern Europe and Asia, with an average score in 2016 of 34 (nine points lower than the

Continued on page 18

19. *Id.*

20. *Id.*

21. CPI 2016.

22. *Id.*

23. CPI 2016; CPI 2015 at 7.

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global average).²⁴ The rankings for Western Europe and the EU remained relatively stable as the survey participants and sources continued to regard this part of Europe with low perceived corruption risks. Denmark retained the number one position as the “cleanest country,” but its score fell by one point to 90, and twelve other Western European countries ranked among the top 20 nations.²⁵

Importantly, this does not mean that the region is immune from corruption. Transparency International noted that the lack of change “does not indicate that the fight against corruption has improved, but quite the opposite.”²⁶ In fact, corruption scandals hit a number of EU countries last year, and even Denmark, the top country on the index, was not immune. In 2016, twenty members of the Danish Parliament did not declare their outside activities or financial interests in their asset declarations.²⁷ The Netherlands, ranked 8th overall, lost four points (87 to 83), following an investigation that revealed how a significant amount of the Police Works Council funds were used by members for expensive dinners, parties, and hotels.²⁸

With regard to the Eastern Europe and Central Asia countries, one country in this region, Ukraine, continued to improve its score, after gaining two points in 2014 and one point in 2015, rising from a score of 27 to 29 in 2016. Transparency International attributed the improvement to the launch of the e-declaration system that allows Ukrainians to see the assets of politicians and senior civil servants, including the president, but noted that systemic problems in the judicial system has stalled cases of grand corruption against the former president Viktor Yanukovich and his allies.²⁹

The capture of political decision-making was identified as one of the most pervasive and widespread forms of political corruption in the Commonwealth of Independent States, where a “culture of impunity prevails among politicians, prosecutors and oligarchs.”³⁰ Transparency International noted that these countries require effective implementation of anti-corruption laws in order to see improvement.

Continued on page 19

24. CPI 2016.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

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(iv) *Middle East and North Africa*

The Middle East and North Africa experienced a very drastic decline in the 2016 index. Overall, Arab countries have yet to see progress in fighting corruption and ending impunity, and the majority of Arab countries have failed to fulfill the will of many residents to build democratic and transparent systems.³¹ As a result, ninety percent of the countries in this region have scored below 50 in the 2016 index.³² Five of the world's most corrupt countries are in this region: Iraq, Libya, Sudan, Yemen, and Syria.³³

“CPI scores and rankings, while frequently useful, remain only a starting point when assessing corruption risk and must be considered alongside developments in legislation, regulation, enforcement, and business practices.”

The United Arab Emirates and Israel led the region in 2016, with rankings of 24th and 28th, and scores of 66 and 64, respectively.³⁴ Israel, Tunisia, Morocco, Iran, Iraq, and Sudan were the few countries that saw slight improvement, increasing their scores by 1-3 points compared to 2015.³⁵ Transparency International attributes Tunisia's improvement to the enactment of progressive anti-corruption legislation and an anti-corruption agency with real authority. However, Tunisia still has a long road ahead in fighting corruption, currently ranking 75th with a score of 41.³⁶ In 2016, Qatar experienced the sharpest decline in this region, dropping from a global ranking of 22nd to 31st and from a score of 71 to 61.³⁷ Transparency International identified that the country was “implicated with FIFA corruption scandals, especially around the votes to host the 2022 World Cup, in addition to human rights violations of migrant workers.”³⁸

Continued on page 20

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. CPI 2016; CPI 2015 at 6.

38. CPI 2016.

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(v) Sub Saharan Africa

In Sub Saharan Africa, corruption was a prevalent issue in the 2016 elections, with the results providing a good reflection of corruption trends across the region. The bottom two ranking countries in the world at 175th and 176th positions are South Sudan and Somalia, with scores of 11 and 10, respectively.³⁹ Only five countries in this region have a score above 50: Botswana, Cape Verde, Mauritius, Rwanda, and Namibia.⁴⁰

The most improved countries in this region were Cape Verde and São Tomé and Príncipe.⁴¹ Both countries held democratic presidential elections in 2016, with a re-election of Jorge Carlos Fonseca in Cape Verde and a smooth transition of government in São Tomé and Príncipe.⁴² Declining scores in other countries, such as in Ghana, the Democratic Republic of Congo, and Gambia depicted the growing dissatisfaction of citizens with their government's corruption records.⁴³ In Ghana, for the first time in the country's history, an incumbent president was voted out.⁴⁴ Transparency International concluded that, in order for this region to improve, leaders that come into office on an "anti-corruption ticket" will need to "implement their commitments to the principles of governance, democracy, and human rights."⁴⁵

Continued on page 21

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

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Conclusion

Overall, corruption impacts all countries, in every region of the world, and no country has achieved close to a perfect score in either the 2016 index or prior versions. This year's results further highlight the link between corruption and social inequality, which provides a source of popular discontent and often feeds a populist surge with leaders promising to cure the problem of rising inequities. As Transparency International noted, this pattern is likely to exacerbate, rather than resolve, the tensions that fed the surge in the first place.⁴⁶ As we emphasized last year, CPI scores and rankings, while frequently useful, remain only a starting point when assessing corruption risk and must be considered alongside developments in legislation, regulation, enforcement, and business practices.⁴⁷

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46. *Id.*

47. Sean Hecker, Andrew M. Levine, Bruce E. Yannett, and Taz Shahabuddin, "2015 Corruption Perceptions Index Shows Few Major Changes," FCPA Update, Vol. 7, No. 9 (Apr. 2016), <http://www.debevoise.com/insights/publications/2016/04/fcpa-update-april-2016>.

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