



Arent Fox

2018 Edition

C-Suite at Risk

A Study of
Individual Liability
Under the FCPA

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Your World**

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Key Findings

In this Arent Fox Special Report, we examine every individual charged with a civil or criminal violation of the FCPA since 2005.

1. More than **50% of all individuals** charged with a violation of the FCPA were their corporation's **CEO, President, Vice-President** or **Director**.
2. Enforcement is on the rise. The biggest risk falls to CEOs, as there were **2.6 times more Chief Executive Officers charged in the past seven years** compared to the previous six. Other positions with higher risk of FCPA charges being brought since 2011: Owner, Salesperson, Director, CFO, Third Party/Agent, Vice-President and General Counsel.
3. The **most civil and/or criminal charges** for violating the FCPA arose from **bribes occurring in Latin America (30%), Asia (28%), and Africa (24%)**. The countries in those regions leading to the most charges are Mexico, Venezuela, Argentina, China, and Nigeria.
4. **Almost all bribe schemes involving China, Mexico, and Venezuela resulted in criminal charges** for the individuals involved. **Mexico** had the highest percentage of criminal cases (**94%**), followed closely by **Venezuela (93%)** and **China (67%)**.
5. **Just under half of all individuals charged (45%)** were involved in **bribes schemes of between \$1 million–\$10 million**. **One-third** were charged from **bribes schemes of under \$1 million**.
6. **For every range of bribes** we examined **under \$10 million**, an overwhelming majority of individuals were charged criminally: **70%** of individuals involved in **bribe schemes under \$500,000**; **73%** of individuals in **bribe schemes between \$500,000–\$1 million**; and **67%** for **bribe schemes between \$1 million–\$10 million**.
7. **More than one in 10 individuals (13%)** were charged criminally, even when they only had a **general suspicion** that bribes could be occurring **without any direct confirmation or involvement themselves**.
8. Those individuals' chances of being charged criminally **more than doubled (29%) if they were told of at least one bribe** but took no part in the misconduct themselves, and their chances **increased over six times (79%) when they knew of the bribery and took at least one step** the government thought facilitated the bribes in some way.
9. **More than 50% of all individuals charged** worked in the **oil/ extraction, telecommunications, energy, healthcare/medical devices, and financial services** industries. Both the **engineering** and **manufacturing** industries were also well represented.
10. And finally, 2017 was a banner year for individual prosecution. The **DOJ charged 20 people** with FCPA violations last year, making it the **second highest number** since the statute became law in 1977.

Introduction

In 2011, we first examined the 61 individuals who faced civil and/or criminal charges for violating the United States Foreign Corrupt Practices Act (FCPA) in the previous six years to determine how US enforcement agencies were treating people behind massive corporate settlements and what lessons, if any, we could draw from the data.

We now update that study to include every individual charged since January 1, 2005 through December 31, 2017. That's 180 individuals, working for 81 different companies, over the past 13 years, and importantly, it covers the first year of the Trump administration.

And as you can see from the previous page, the data tells a powerful story that should inform the actions of every executive, officer, employee, and third-party agent working for companies conducting any type of cross-border business.

It's one thing to recognize the significance of the Yates Memorandum in 2015, and the fact that the Department of Justice charged 20 individuals with FCPA violations in 2017 – the second highest number since passage of the law in 1977. It's another to unpack the data and see what trends extend beyond one or two years – or over different administrations. This study – which to our knowledge is the largest and most comprehensive of its kind – accomplishes that important task.

Methodology

Our study reviewed every government-initiated FCPA enforcement action against an individual defendant from January 1, 2005 through December 31, 2017 that is pending or resulted in either a settlement or a conviction.¹ Each of the 180 individual defendants we studied were the subject of civil and/or criminal enforcement actions based on their alleged violations of the FCPA.

Criteria

1

The individuals' name, company, and job title/position

2

The year, location(s), and amount(s) of alleged improper payments

3

The types of charges that were filed (civil, criminal, or both)

4

The disposition of those cases

5

Penalty imposed in each case

6

What industries or commercial sectors were involved

7

Number of government-initiated prosecutions against corporate entities in which affiliated individuals were also charged

8

The level of intent possessed by each individual

Who Is Being Targeted?

Over half of all individuals charged held the position of CEO, President, Vice-President, or Managing Director/Director in their corporation.

Our data revealed that over half (53%) of all individuals charged with a civil and/or criminal violation of the FCPA since January 1, 2005 held the position of CEO, President, Vice-President, or Managing Director/Director in their corporation.² As illustrated in **Figure 1**, other key positions in the C-Suite and Management are also well-represented.

But when you look at those numbers from a different perspective, you learn something entirely new. Comparing the period 2005–2010 to 2011–2017 in **Figure 2** below, it is clear that for most C-suite and other senior positions, an individual was more likely to be charged during the past seven years than in the previous six.

What the Data Shows

- Risk exists for all positions, especially the C-Suite
- Increased risk in past seven years for GC, SVP/VP, Agents and Third Parties; CFO, Managing Directors and Directors; Salespeople; Owners and CEO
- Number of CEOs jumped the most with 2.6 times as many charged in the past seven years (2011–2017) as compared with the previous six (2005–2010)

Figure 1. Number Of Individuals Charged by Title 2005–2017

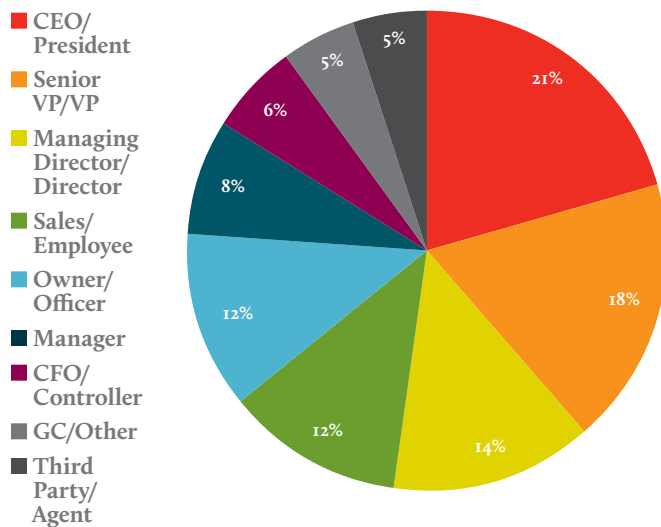


Figure 2. Number Of Individuals Charged By Title 2005–2010 vs. 2011–2017

	2006–2010	2011–2017	Trend
CEO	5	13	+8
Owner	2	5	+3
Sales/Employee	6	15	+9
Managing Director/Director	10	15	+5
CFO	3	4	+1
Agent/Third Party	4	5	+1
Other/Unstated	3	4	+1
SVP/VP	15	17	+2
General Counsel	0	1	+1
President	15	6	-9
Manager	9	5	-4
Executive/Officer	8	7	-1
Controller	2	1	-1

Where Are The Bribes Paid?

More individuals were charged when the alleged bribes occurred in Africa (Nigeria), Asia (China), and Latin America (Mexico, Venezuela, and Argentina) than in any other parts of the world.

We also reviewed the primary country where the alleged bribes were paid in an effort to determine patterns that impact when, if, and how or an individual was charged. As you can see from the **Figures 3-5**, the top five bribe locations that led to individual liability correspond to countries with historic corruption issues and low Corruption Perception Index (CPI) scores.

Interestingly, however, when you compare the data from 2005-2010 to 2011-2017, you find that only Mexico and China make both lists. The country with the most individuals charged over the past thirteen years, Nigeria, doesn't appear as a "top five" in the past seven years. This data tells us that corporations doing business in Mexico and China would be well-served to put their compliance house in order and that the overall diversity of bribe locations indicates an opportunistic rather than geographic approach on the part of the DOJ and SEC.

What the Data Shows

- The most civil and/or criminal charges arose from bribes occurring in Latin America (30%), Asia (28%), and Africa (24%).
- Bribe schemes involving Mexico (94%), Venezuela (93%) and China (67%) had the highest chance of leading to criminal charges.

Figure 3. Top Five Countries - Primary Bribe Location, 2005-2017

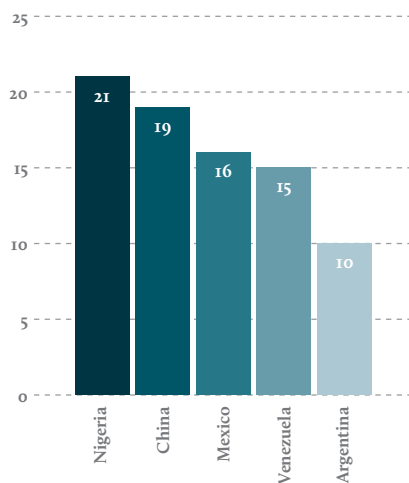


Figure 4. Top Five Countries - Primary Bribe Location, 2005-2010

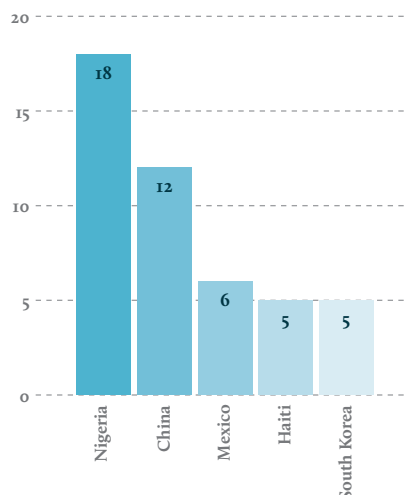
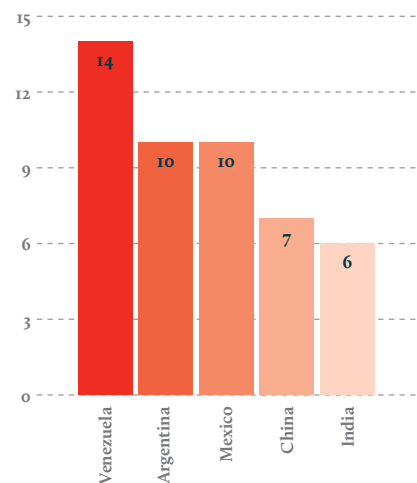


Figure 5. Top Five Countries - Primary Bribe Location, 2011-2017



How Much Is Being Paid?

Just under half of all individuals charged (45%) were involved in bribes schemes of between \$1 million and \$10 million. One-third (33%) were charged from bribes schemes of under \$1 million.

We next examined the amounts of the alleged bribes to determine when it became more likely for a case to result in criminal charges rather than civil – and even worse, when it would be both.

The most common amount of bribes leading to individual charges is between \$1 million and \$10 million. Of those cases, approximately 63% were charged criminally, and an additional 6% were charged both civilly and criminally.

But the bias toward criminal charges extends even to “lower-level” bribes. As you can see from **Figure 7**, individuals in cases involving bribes between \$100,000–\$499,000 were still more than twice as likely to be charged criminally than civilly.

What the Data Shows

- For every range of bribes we examined under \$10 million, a majority of individuals were charged criminally, from 67% (\$1 million–\$10 million) to 73% (\$500,000–\$1 million).
- However, since 2011, fewer individuals are being charged when the bribes are under \$1 million – and conversely, more individuals are facing charges when the bribes exceed \$1 million.
- So while the risk of being charged criminally still exists for bribes under \$1 million, the chances of those charges actually occurring have decreased in the past seven years.

Figure 6. Percentage of Individuals Charged by Amount of Alleged Bribes, 2005–2017

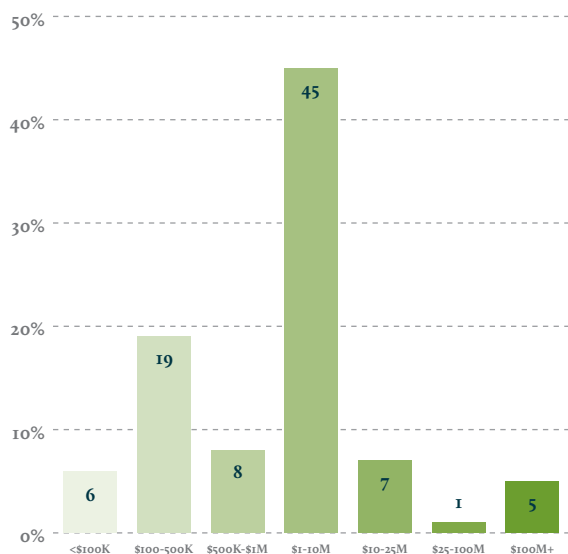
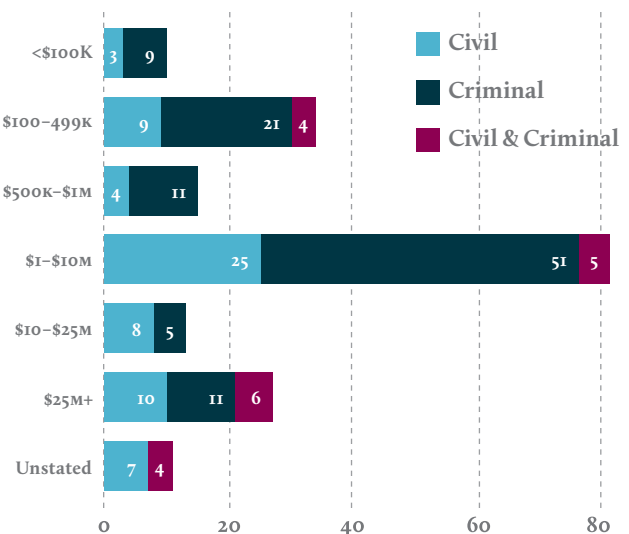


Figure 7. Number of Individuals Charged by Type of Case and Amount of Alleged Bribes, 2005–2017



What About Knowledge & Intent?

More than one in 10 individuals (13%) were charged criminally, even when they only had a general suspicion that bribes could be occurring and were never specifically aware of or had any role in the bribery.

It was also important to review the level of each individual's knowledge of the alleged misconduct and involvement with it. We tracked and categorized the data using a three-tiered system found in **Figure 8**.

Since 2005, the pattern that emerges is as stark as it is unsurprising: the more knowledge and involvement one has, the greater the risk that charges will be brought and the more serious those charges will be. The overwhelming number of individuals (92%) charged with a civil and/or criminal violation of the FCPA had both direct knowledge and took some action to assist the scheme.

The data did, however, reveal some surprising and in some cases, revealing points.

For example, more than one in ten individuals (13%) were charged criminally, even when they only had a general suspicion that bribes could be occurring and were never specifically aware of or had any role in the bribery.

Their chances of being charged criminally more than doubled (to 29%) if they were told of at least one bribe but took no part in the misconduct themselves, and those chances increased by more than six times (to 79%) when they knew of the bribery and took at least one step the government thought facilitated the bribes in some way.

What the Data Shows

- The number of individuals with indirect or direct knowledge charged decreased during the past seven years (2011-2017) when compared to the previous six (2005-2010).
- That trend does not extend to those with direct knowledge and who took some affirmative action to facilitate the alleged bribes, however.

Figure 8. Three-Tiered Approach to Knowledge & Involvement

Indirect Knowledge Only

The individuals were never told directly of the improper conduct. At most, they were aware of circumstances that would lead a reasonable person to suspect impropriety and investigate. Their liability was based primarily on their subsequent failure to ask questions and take prudent steps to discover and stop the bribery from occurring.

2.2X

Direct Knowledge Only

Unlike those in the category above, these individuals were actually informed (in writing and/or by someone telling them) that improper payments were being made and then took no action to stop them. However, these individuals did not play a direct part in the misconduct.

6.1X

Direct Knowledge and Action

The most serious of the three categories, these individuals were allegedly aware of the improper conduct and took some active role in the bribery or an action which the government believed assisted or allowed the bribes to happen and/or continue.

What Industries Are Targeted?

Over half of all individuals charged worked in five industries.

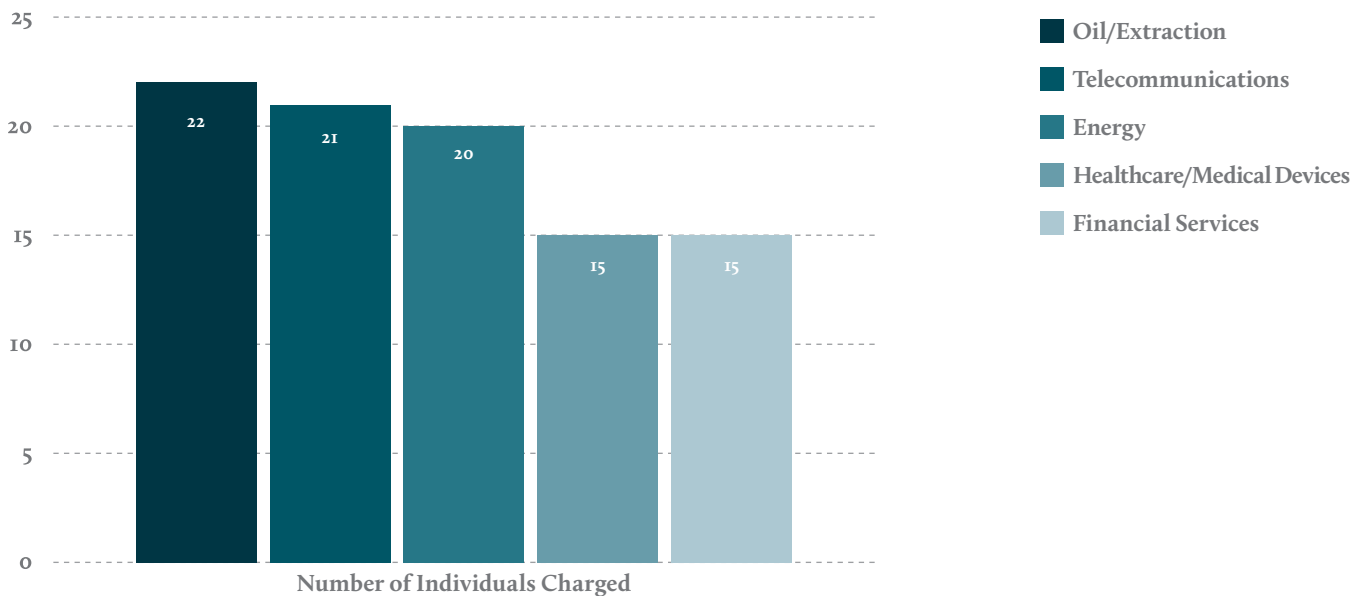
The 180 individuals reviewed as a part of our study worked for 81 different companies. The vast majority of those companies fall within five industries.

As demonstrated in **Figure 9**, the top five industries represented are unsurprising and relatively consistent over the years studied. Together, 52% of all individuals charged worked in the oil/extraction, telecommunications, energy, healthcare/medical devices, and financial services industry. Both the engineering and manufacturing industries were also well represented.

What the Data Shows

- Our study tracked individuals in more than 25 different industries.
- The industries with 15 or more individuals charged are oil/extraction, telecommunications, energy, healthcare/medical devices and financial services.
- Other key industries with more than 10 individuals charged with FCPA violations include engineering/construction, general manufacturing, and aviation. Also well-represented are defense contractors, and travel/transportation providers with 9 individuals each.

Figure 9. Top Five Industries Targeted in FCPA Cases Against Individuals, 2005–2017



What Are The Big Takeaways?

Here are five.

Despite The Change In Administration, The Focus On Individual Prosecutions Continues.

With the new administration's first year behind us, it's interesting to note 2017 recorded the second-highest number of individual FCPA prosecutions since 1977. And with the formalization of the "FCPA Corporate Enforcement Policy," it's fair to presume companies will be forced to disclose individual "wrongdoers" now more than ever.

C-Suite Beware.

While always a clear target, the C-Suite has been and will continue to be in the DOJ's and SEC's crosshairs. Remember, over half of all individuals charged since 2005 were the CEO, President, Vice-President, or Managing Director/Director of their organization.

Location, Location, Location.

The past seven years reveal that bribes paid in Latin America (especially Argentina, Venezuela, and Mexico) are leading to more FCPA cases against individuals than other parts of the world. While meaningful compliance efforts should be strengthened globally, companies doing business in Central and South America would be well-served to pay special attention to our closest neighbors.

Catch It Early.

The higher the value of the bribes, the more likely it is an individual will be charged - and charged criminally.

See Something, Say Something.

Doing nothing – even when you only have a general suspicion of bribery – is risky. Remember more than 1 in 10 such individuals were charged criminally.

The Authors

The following authors of this study are key members of Arent Fox's Business Compliance and Integrity Monitorship Team.



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End Notes

- ¹ This study excluded 22 actions related to a 2010 FBI undercover operation that were dismissed with prejudice in 2012.
- ² When an individual had more than one job title, the more senior title was used.



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