

In this Special Report, Scott Peeler reviews lessons and patterns from his review of government-initiated civil and criminal FCPA cases filed against individuals since 2005.



A Study of Individual Liability under the Foreign Corrupt Practices Act

A Review of Government-Filed Civil and Criminal FCPA Cases Against Individuals

By M. Scott Peeler in New York

It's no secret that the Foreign Corrupt Practices Act (FCPA), which makes it an offense to directly or indirectly offer and/or give a corrupt payment to a foreign official for a business advantage, is being rigorously enforced by the U.S. Department of Justice and Securities Exchange Commission. What is becoming equally clear is that FCPA enforcement is not just limited to those companies that fail to maintain the highest ethical and anti-corruption standards.

As the recent guilty verdicts in the Lindsey Manufacturing case illustrate all too well, the U.S. government is actively pursuing

cases against individual corporate officers and executives who either suspected impropriety but failed to investigate or in the worst cases, knew and actually actively participated in the misconduct.

In this *Chadbourne Compliance Quarterly Special Report*, we examine the results from our recent study of major government-initiated civil and criminal FCPA cases filed against individuals since 2005. The results are both informative and instructive - especially for executives, key stakeholders and board members worried about what this incredible enforcement trend might mean to them.

INTRODUCTION

Our case study reviewed 61 individuals who were the subject of a recent (within the past six years), government-initiated civil and/or criminal action based on alleged violations of the FCPA. These individuals worked for 26 different companies, and the data we compiled includes (a) the individual's name, company and job title/position; (b) the year, location and amount of alleged improper payments (if known); (c) the types of charges that were filed (civil, criminal or both); (d) the current status of those cases; (e) the resulting penalty (if known); and (f) whether the individual had indirect or direct knowledge and/or played any role in the alleged misconduct.

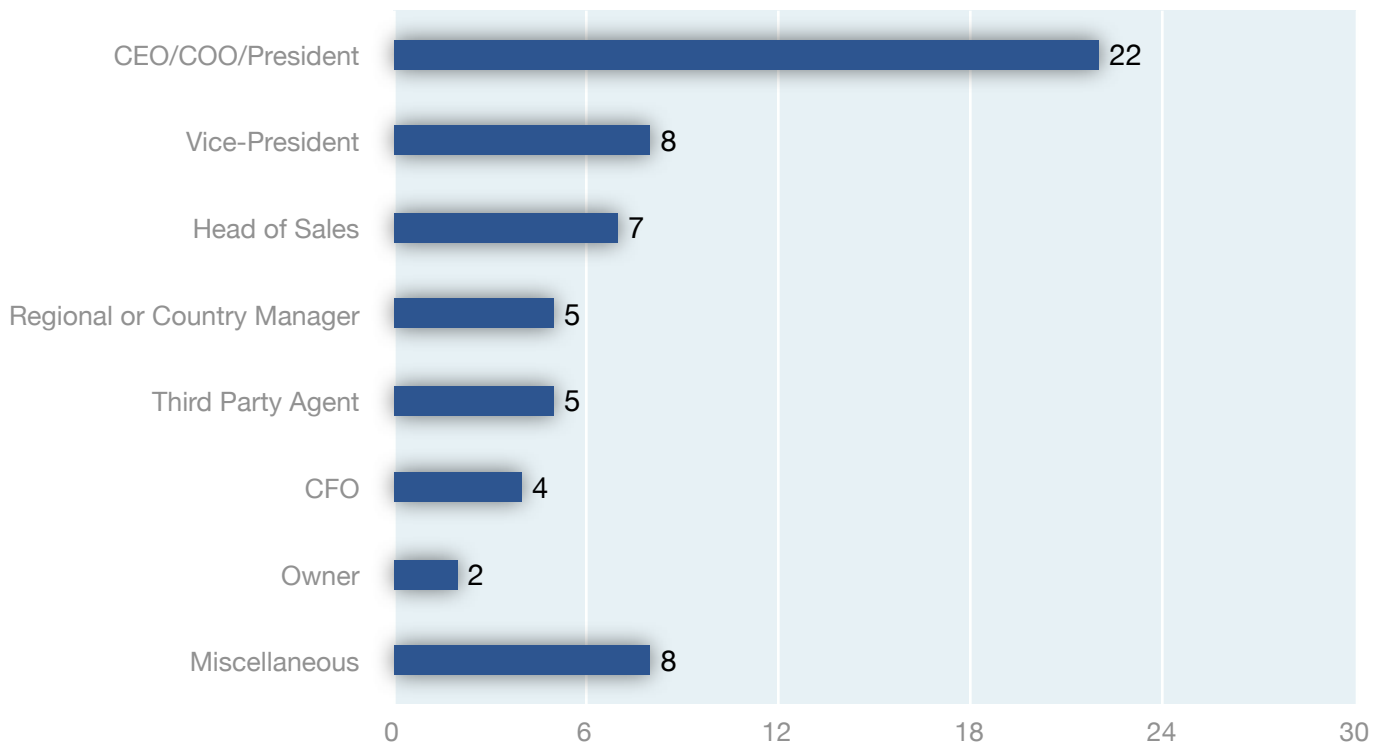


The criminal case against Lindsey Manufacturing, a producer of emergency restoration systems, and two of its top executives also highlights how FCPA liability often arises through the actions of a third-party agent. The US Government alleged that Lindsey hired a company called Grupo Internacional de Asesores to be its sales representative in Mexico and intentionally paid its director an inflated 30% commission knowing that a large part of those funds would be used as bribes to improperly obtain lucrative contracts with CFE, the Mexican state-owned utility. In addition, the US also argued that the cost of Lindsey's goods and services was inflated by 30% so the Mexican utility was in essence paying for the alleged bribes.

At the conclusion of the five week trial, the jury returned guilty verdicts on May 10 against the company, its executives, and an owner of the third-party agent.

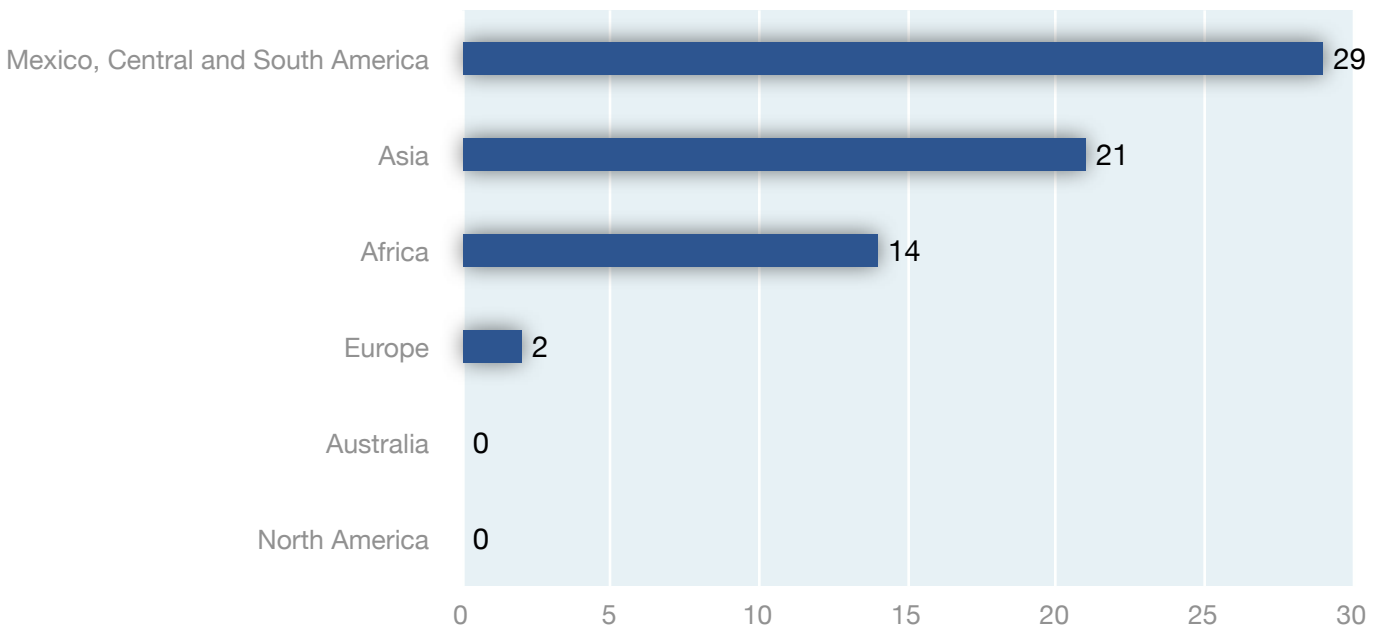
JOB TITLE/POSITION

The overwhelming majority (35%) of those charged with civil and/or criminal violations of the FCPA were the President, Chief Executive Officer or Chief Operating Officer of their respective company. Most other statistically relevant positions (Vice President - 13%, Head of Sales - 11%, and Regional or Country Manager - 8%) were represented in roughly equal proportions. Also of note, and consistent with enforcement trends, 8% of individuals surveyed were third-party agents.



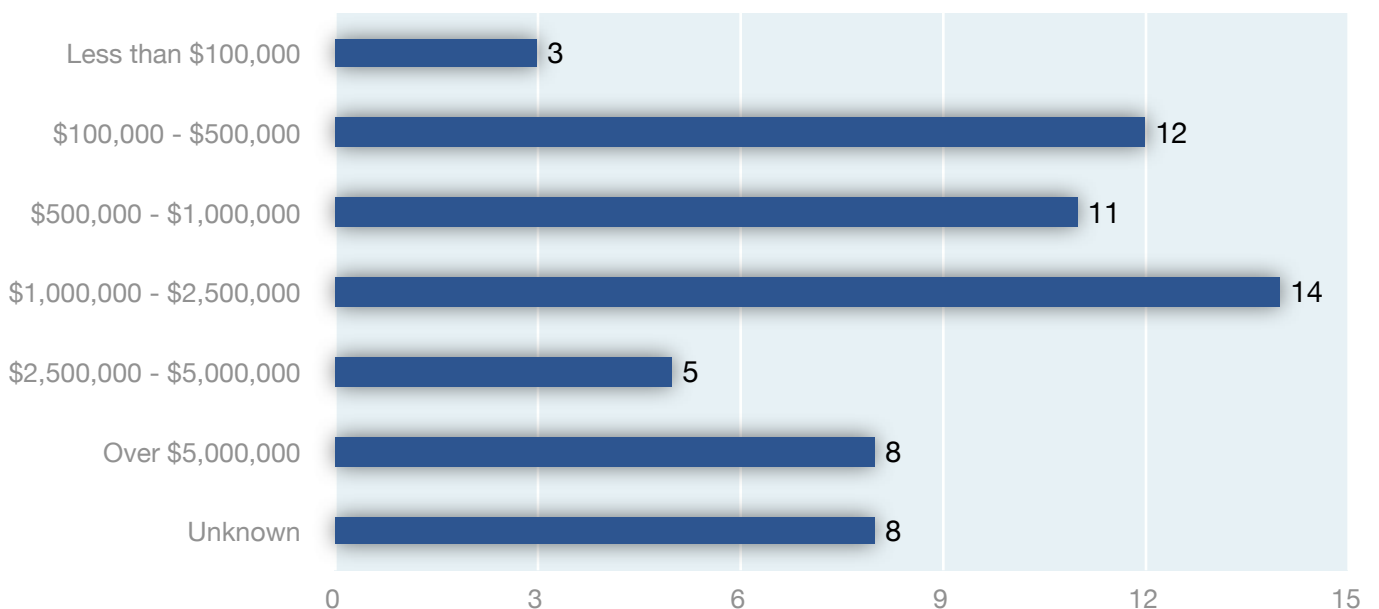
REGION OF ALLEGED MISCONDUCT

In each case, we tracked the region of the world where the alleged improper payments occurred in order to determine where the risks of prosecution are the greatest. Based on the data compiled, individuals conducting business in Mexico, Central and South America were the most likely to be prosecuted, making up 44% of cases. The other regions in descending order were Asia (32%); Africa (21%); and Europe (3%).



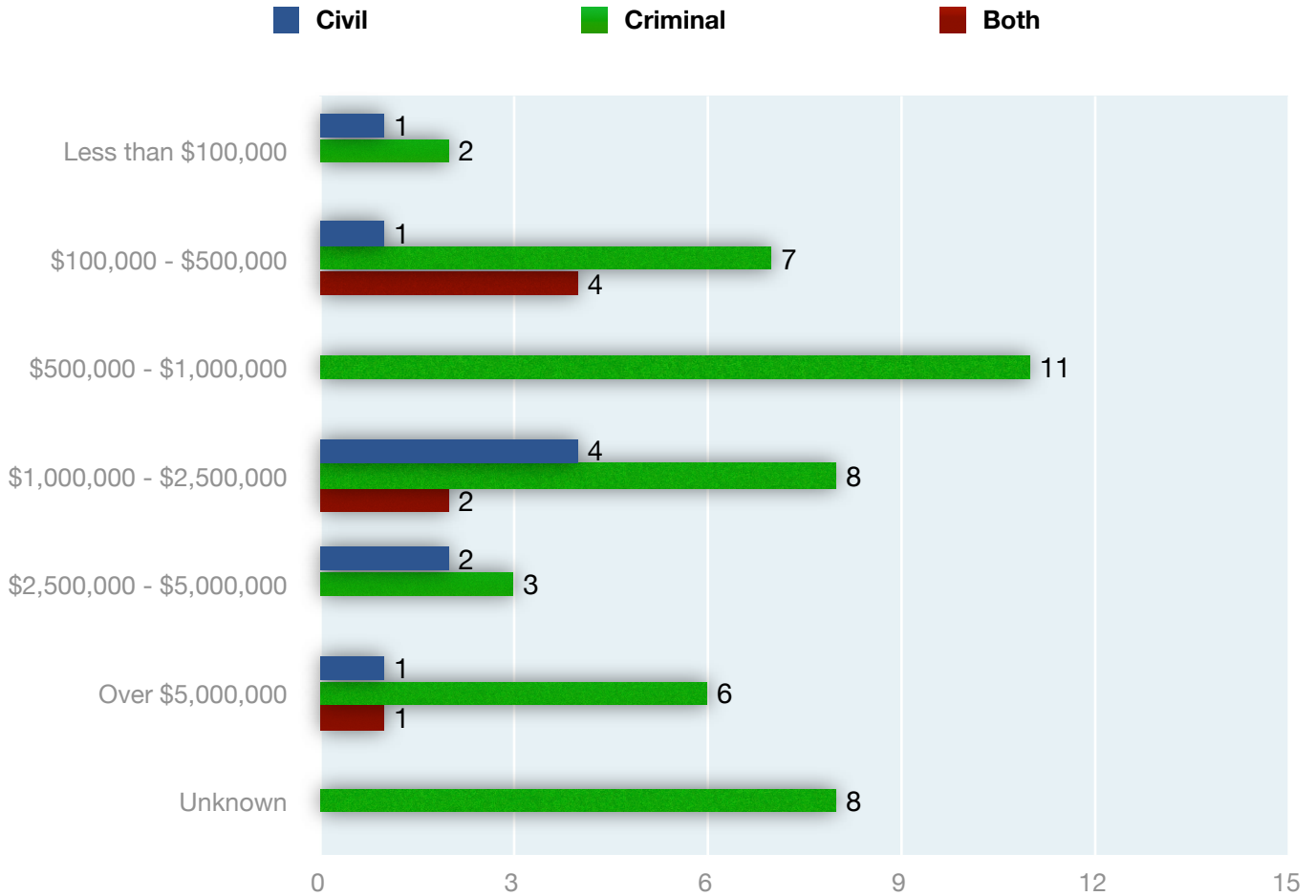
AMOUNT OF IMPROPER PAYMENTS

We also looked closely at the amounts (in US dollars) of improper payments alleged to have been paid to determine whether the risk of an FCPA case being filed grew higher at certain amounts. Based on our data, however, there were almost as many cases where the amount of bribes alleged to have been paid were between \$100,000 - \$500,000 (12) or \$500,000 - \$1,000,000 (11) as there were between \$1,000,000 - \$2,500,000 (14). Obviously, any amount of bribes paid will subject the individuals involved to a risk of civil and/or criminal liability; however, as the amounts increase, so does that risk.



AMOUNT OF IMPROPER PAYMENTS - TYPE OF ACTION FILED

Where the data regarding the amount of alleged bribes paid is most interesting, however, is our analysis of whether higher amounts paid resulted in an increased risk of a *criminal* case being filed. Here, the data shows that (a) an individual with knowledge and/or who was involved in a bribe scheme is more likely to be charged with a crime (rather than a purely civil case) regardless of the amount involved; and (b) that risk increases as the amounts grow higher.

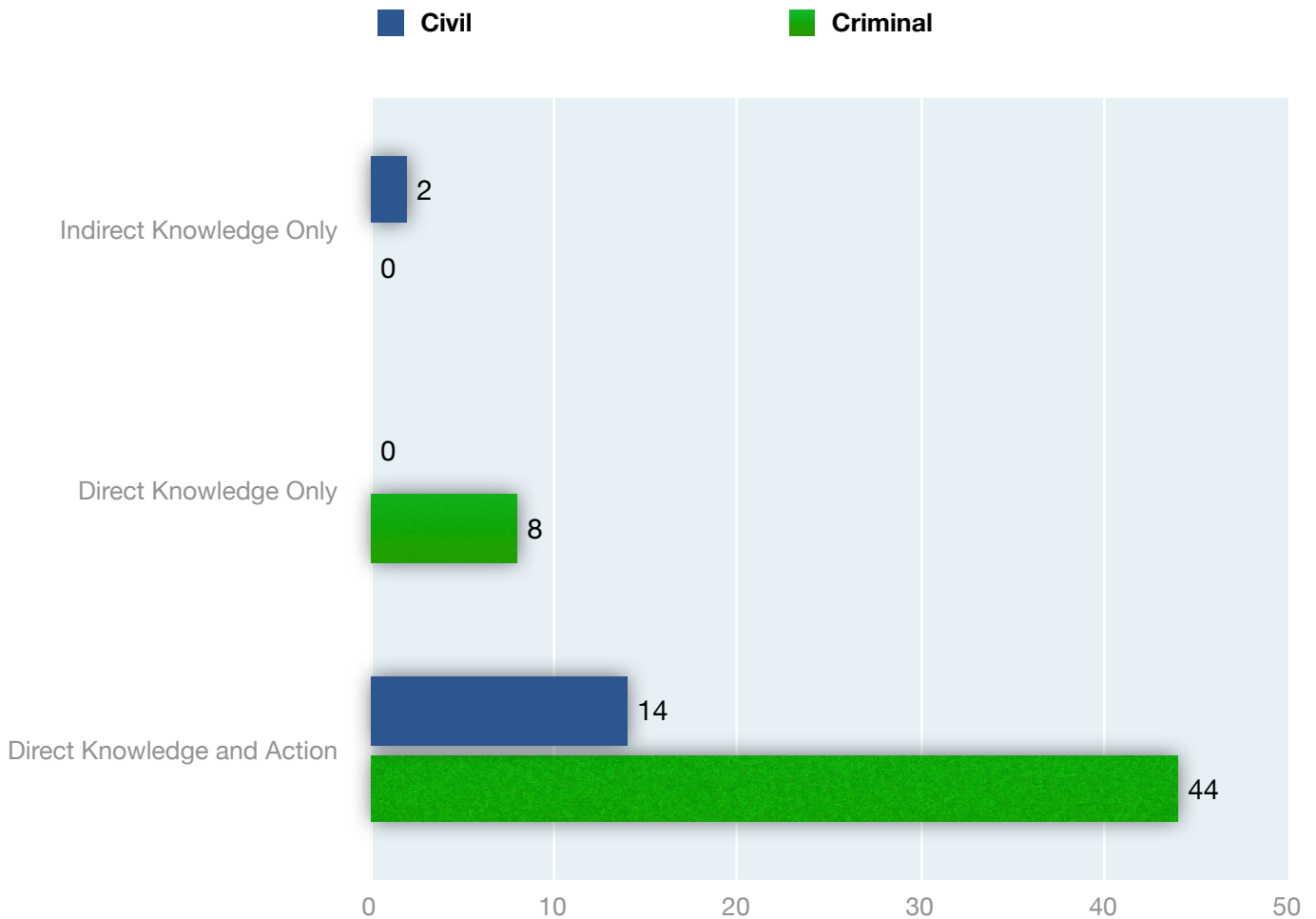


ROLE OF KNOWLEDGE AND ACTIVITY - TYPE OF ACTION FILED

We also assessed the apparent impact that an individual’s level of knowledge or involvement in the alleged bribe scheme had on the type of action filed. For ease of review, we categorized and tracked three distinct levels:

1. **Indirect Knowledge Only:** In these cases, the individuals were never told directly of the improper conduct. There was evidence, however, that 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. **Direct Knowledge Only:** Unlike those in the “indirect knowledge” category above, individuals with “direct knowledge” were actually informed (in writing and/or by someone telling them) that improper payments were in fact being made and then taking no action to stop them. These individuals, however, did not play any direct part in the misconduct.
3. **Direct Knowledge and Action:** The most serious of the three categories, these individuals allegedly were aware of the improper conduct and actually took some active role that assisted or allowed the alleged bribes to happen and/or continue.

The data here seems to suggest that if an individual had only indirect knowledge of improper conduct, there is certainly a risk of a civil action being filed. As the level of that individual’s knowledge and/or involvement increases, the risk of both civil and/or criminal charges being filed grows substantially.



CONCLUSION

So considering all this data, what lessons should a prudent corporate executive draw from these unfortunate individuals? I end with five unavoidable conclusions:

1. **Don't Be An Ostrich:** At the first sign that any of your employees or third party agents may be involved in paying bribes (and remember that a bribe can be anything of value), you must immediately commence a meaningful investigation to flesh out and actively deal with any improprieties discovered. When doing so, keep in mind the value of privilege and working fast.
2. **Don't Be A Fool:** Some of your predecessors thought they were clever enough to actually know of and/or participate in a bribe scheme and not be caught. Surely they must have believed one or more of these often-quoted, self-delusional and patently false statements: *“nobody will find out;”* *“it’s only a small bribe - everyone’s doing it;”* *“even if discovered, I’ll never go to jail;”* and *“it’s worth the risk - you can’t get things done in [insert country name here] without bending the rules.”* In today’s world of e-mails, whistleblowers, and aggressive government enforcement (including prison sentences on FCPA cases up to 7-8 years so far), you can’t afford to make these same mistakes in judgment. The moment anyone tells you about bribes being paid, don’t do anything that could later look like acquiescence - call a lawyer immediately (yes, it’s that serious), get to the bottom of things, and follow their advice!

3. **Define Your Culture Before It Defines You:** As an executive and/or a key stakeholder in your company, the U.S. (and soon U.K.) government expects you to play an active and demonstrable role in defining the “right kind” of corporate culture - one that never tolerates bribes and actively works to insure they aren’t part of your direct or indirect business. A failure to do so can clearly have devastating consequences for your organization, but given this data, the advantages of this course of conduct for individual corporate leaders should also be obvious.
4. **Play to Win:** Use the same skill, drive and intellect on the anti-corruption front that earned you that leadership role in the first place. In other words, know your opponent’s strengths as well as you know your own weaknesses and protect yourself where you’re most vulnerable. Here, your opponent (the government) has every major advantage - they are well-funded; offer seven-figure whistleblower rewards (or bounties, in my view) for original information that helps build an FCPA case; and work closely with governments around the globe to detect and prosecute bribery wherever it is found. Your weakest spot by definition will be your business operations in the emerging markets - both the conduct of your own employees as well as those third party agents (sales agents and distributors, government relation specialists, lawyers, accountants, etc.) you’ve hired to assist you conquer those difficult markets. (And yes, the government already knows this is your Achilles’ heel - it’s everyone’s). So be smart - put in place the strictest anti-corruption controls where they are needed most; train and keep training your employees and fellow managers in these regions so they fully appreciate the risks of non-compliance and truly take your zero-tolerance message to heart; and get tough when it’s needed. All of these efforts will save your company and you from a great deal of pain.
5. **It’s Never Too Late:** Finally, some clients come to me starting with literally nothing while others have robust anti-corruption policies and procedures that merely need a little polishing. Regardless of where on that spectrum you fall, it’s never too late to start. Putting in place a gold-standard anti-corruption program just makes sense - it mitigates risk while protecting the company from foreseeable risks. And best of all, what’s good for your company is also good for you.



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