

Getting Ahead of the Anti-Corruption Curve. The US FCPA and Whistleblower Provisions

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Presentation Summary

- **Foreign Corrupt Practices Act (FCPA - 1977)**
 - History
 - Enforcement by SEC and DOJ
 - Application to Latin America
- **Whistleblower Provisions (Dodd Frank Act 2010)**
 - Overview
 - Description
 - Results
- **Take-Away for Executives, Board Members and Companies**

FCPA

- The FCPA was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign officials to assist in obtaining or retaining business (“improper advantage”).
- **Two sections:** 1) Anti-bribery provisions; 2) Recordkeeping and Internal Control Provisions (which only apply to issuers).
- FCPA applies to 1) “domestic concerns”, 2) “issuers” and 3) foreign nationals involved in any such acts which take place in the US.
- To date, there have been 270 DOJ actions (75% settled) and 185 SEC actions (91% settled). More than 300 individuals have been charged by, or entered into settlement agreements with, the US government.
- Over 50 individual defendants have served jail time.
- Total monetary sanctions imposed in all FCPA-related enforcement actions:
USD~\$8.25 Billion

History of FCPA

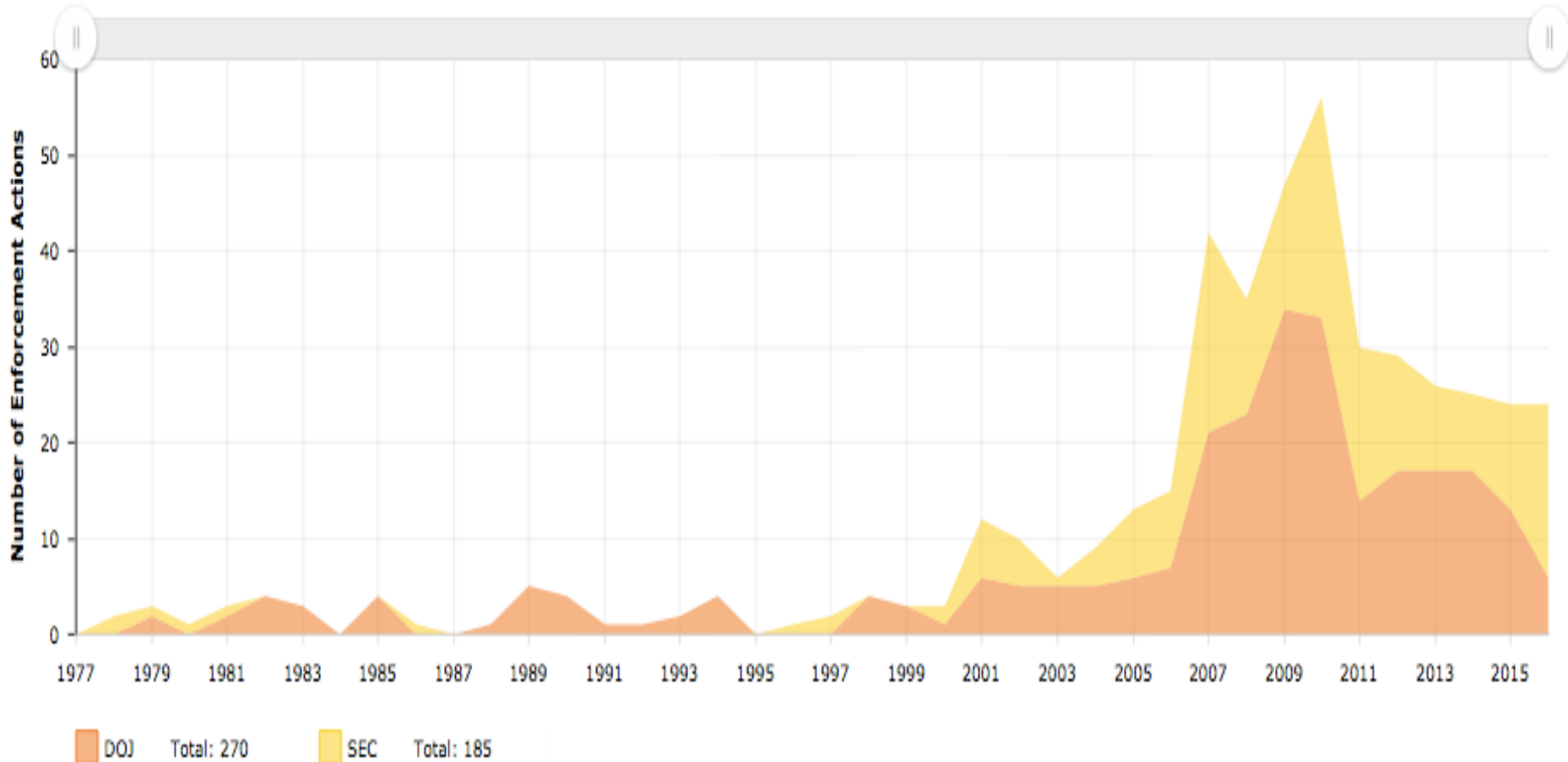


Scandal prompting resignation of Nixon as President of the United States in August 1974.

FCPA

- The Watergate investigation also led to the prosecution of several companies and executives for using slush funds to make illegal political contributions to American politicians.
- The SEC then found that some companies also used secret funds to pay off foreign officials, with an eye to landing contracts abroad.
- SEC Voluntary Disclosure Program in 1975: more than 500 U.S. companies admitted making questionable payments totaling more \$300M to foreign government officials and politicians.
- Congress held hearings '75-'76 & FCPA was enacted in '77
- *“Corporate bribery is bad business. In our free market system it is basic that the sale of products should take place on the basis of price, quality and service”* US Senate, 1977

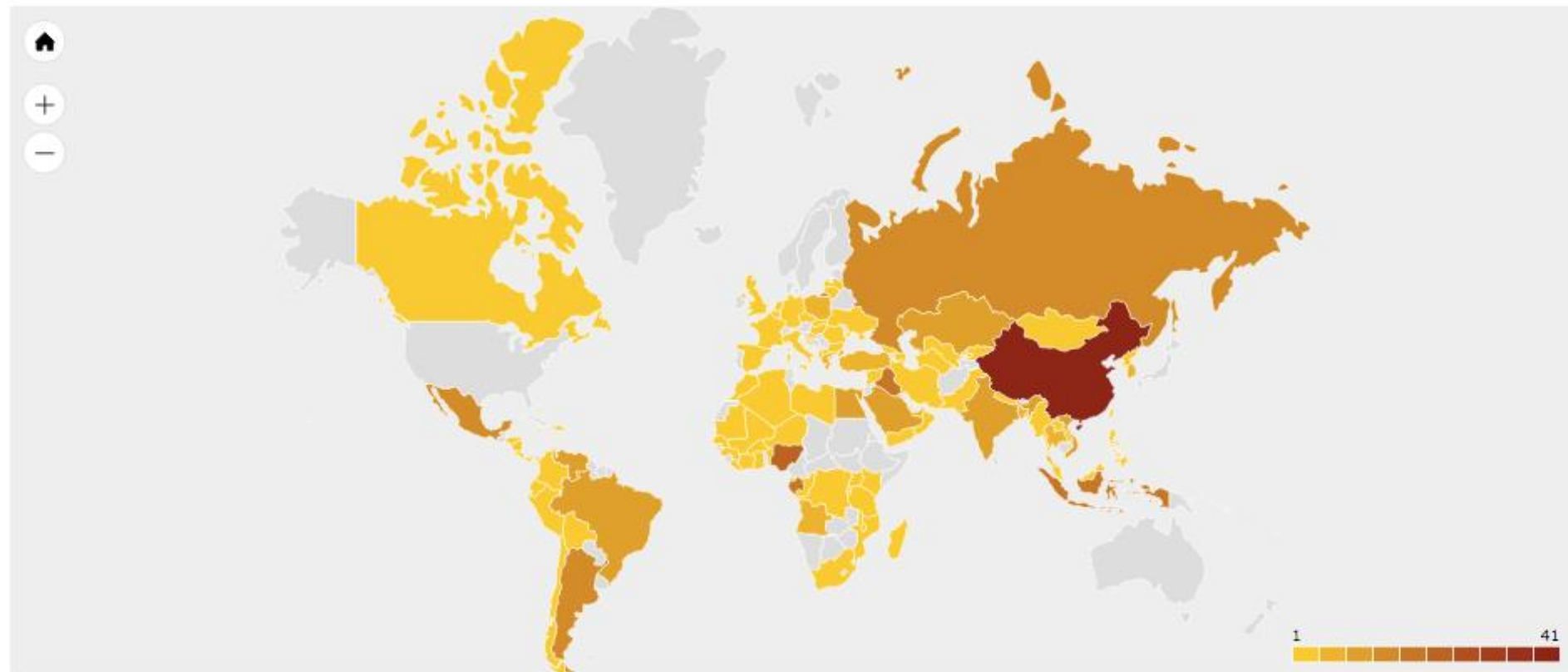
DOJ and SEC Enforcement Actions '77-'15



Source: Stanford Law School FCPAC fcpa.stanford.edu

Geography of FCPA

Location of Improper Payments (All Years)



Latin America: Mexico #6; Argentina #8; Brazil #11 and Venezuela #12

Source: Stanford Law School FCPAC fcpa.stanford.edu

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Top FCPA Sanctions

FCPA Groups	Total Sanction
TSKJ's Involvement in Nigeria from 1994 to 2004	\$ 1,715,938,854
Alstom's Involvement in Multiple Countries from 2000 to 2010	\$ 860,294,800
Siemens' Involvement in Multiple Countries from 1996 to 2007	\$ 801,858,957
VimpelCom's Involvement in Uzbekistan between 2006 and 2012	\$ 795,326,798
BAE Systems' Involvement in Czech Republik, Hungary, and Saudi Arabia in 2000	\$ 400,000,400
Total's Involvement in Iran from 1995 to 2005	\$ 398,200,000
Alcoa Subsidiaries' Involvement in Bahrain between 1989 and 2009	\$ 384,000,400
Daimler's Involvement in Multiple Countries between 1998 and 2008	\$ 185,025,467
Weatherford's Involvement in Multiple Countries between 2002 and 2011	\$ 152,791,016
Alcatel's Involvement in Multiple Countries from 1999 to 2007	\$ 139,134,900
Avon's Involvement in China between 2004 to 2008	\$ 135,013,413
Hewlett-Packard's Involvement in Russia, Mexico, and Poland between 2003 and 2010	\$ 110,751,824

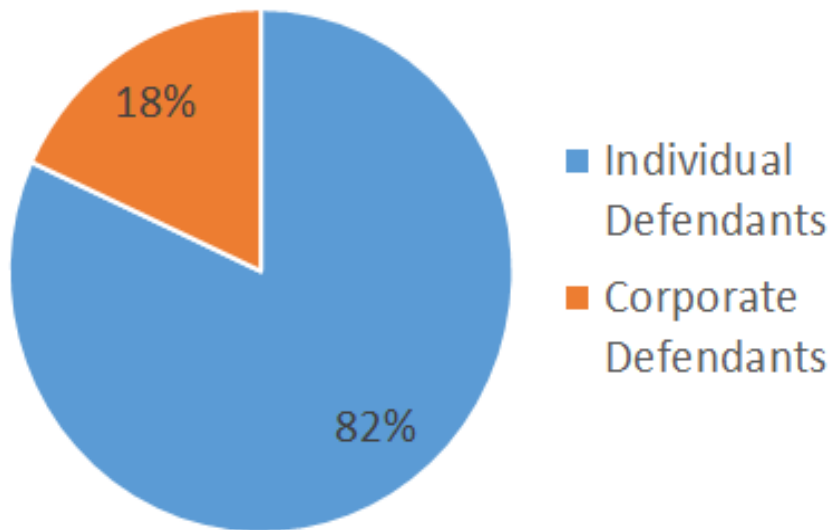
The Yates Memorandum (Sept 7, 2015)

The Yates Memorandum (DOJ) outlines the following six key steps intended to strengthen **DOJ's focus on pursuing individual wrongdoers**:

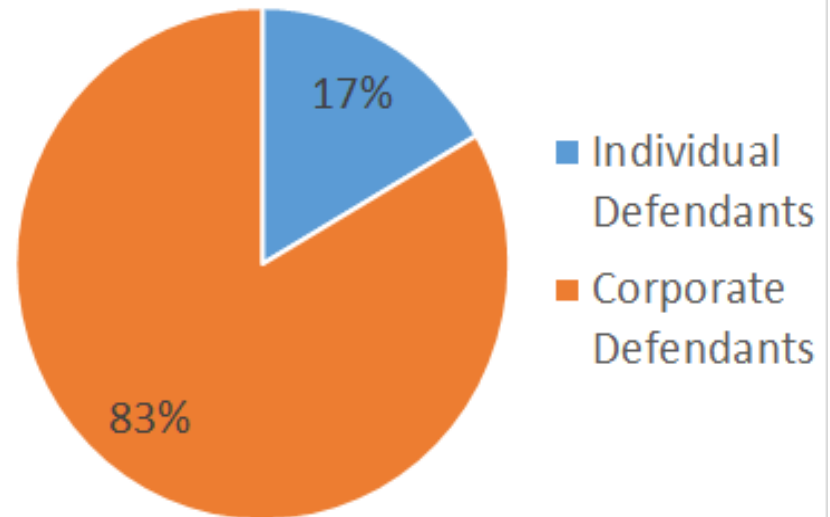
1. To qualify for any cooperation credit, companies must provide DOJ with all relevant facts relating to the individuals involved in the corporate misconduct;
2. Criminal and civil investigations should focus on individuals from their inception;
3. Criminal and civil DOJ attorneys handling corporate investigations should be in routine communication with one another;
4. Absent extraordinary circumstances or approved Departmental policy, DOJ will not release individuals from civil or criminal liability when resolving a matter with a corporation;
5. DOJ attorneys should not resolve matters with a corporation unless there is a clear path to resolve related individual cases, and they should memorialize any declinations as to individuals in such cases; and
6. Civil DOJ attorneys consistently should focus on individuals, and should evaluate whether to bring suit against an individual based on considerations beyond ability to pay.

FCPA charges by DOJ and the SEC in 2015

DOJ FCPA Enforcement Actions, 2015

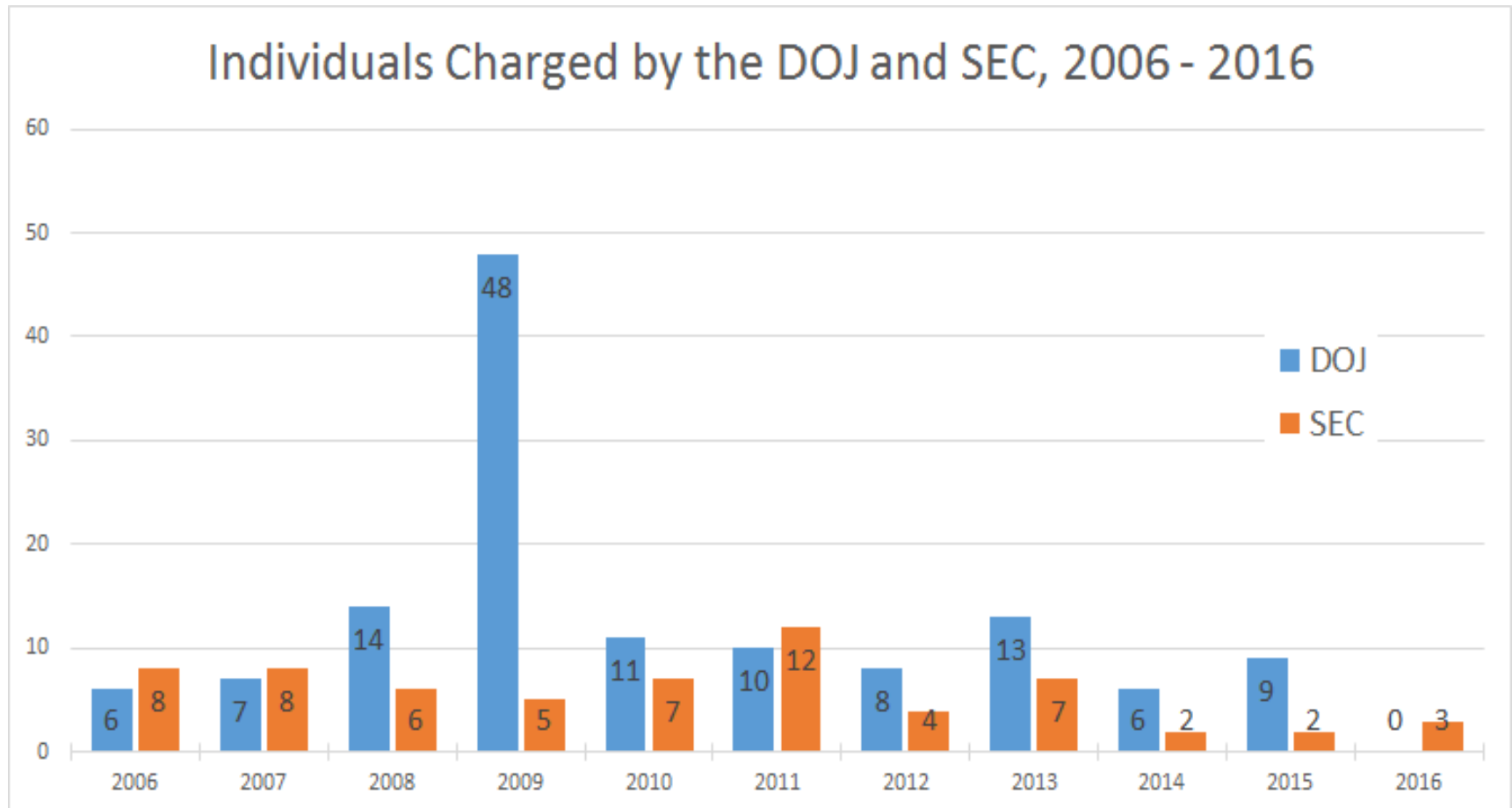


SEC FCPA Enforcement Actions, 2015



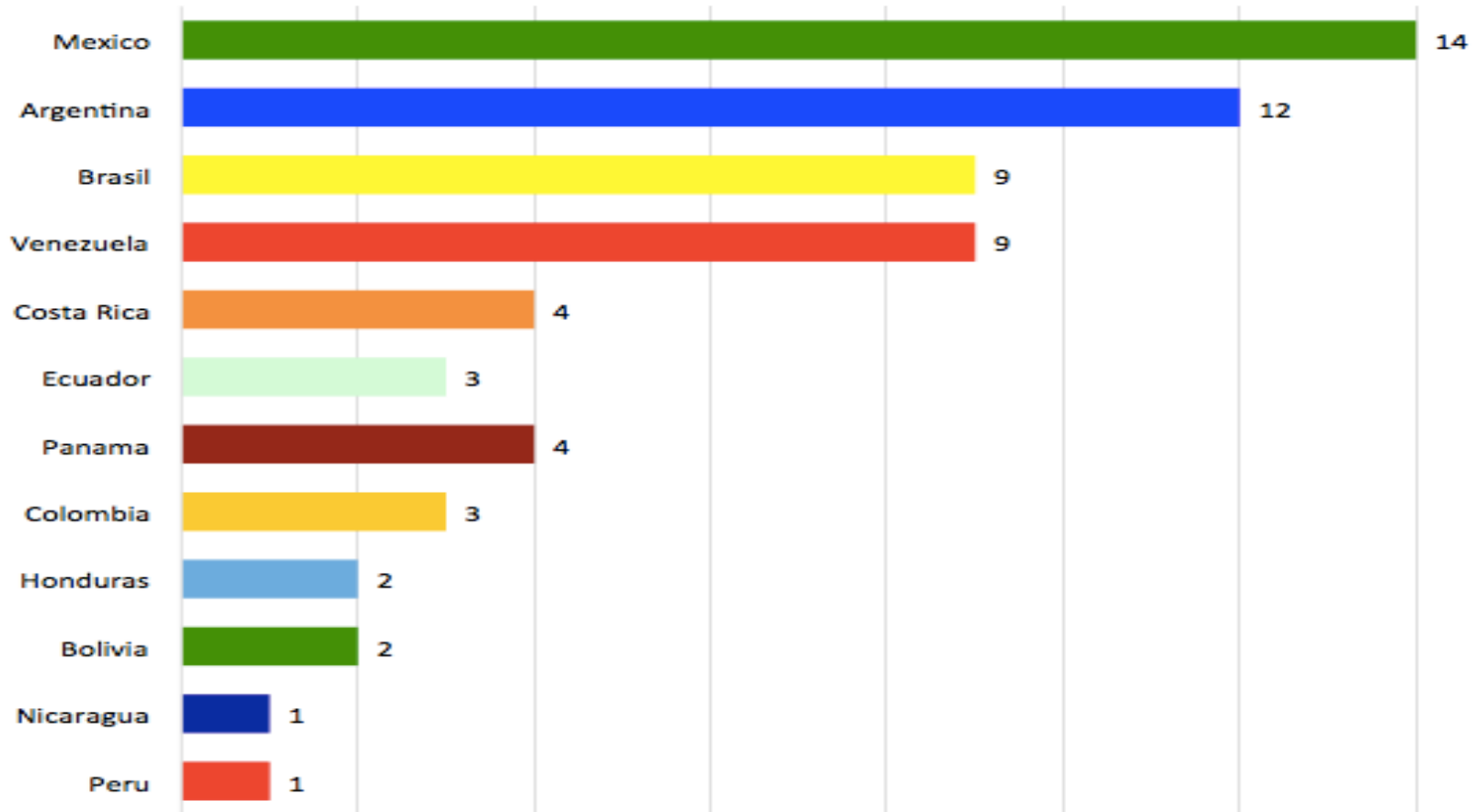
Source: Stanford Law School FCPAC fcpa.stanford.edu

FCPA Enforcement by DOJ and SEC



Source: Stanford Law School FCPAC fcpa.stanford.edu

FCPA in Latin America (in 2016, 30% of all cases)



Source: Stanford Law School FCPAC fcpa.stanford.edu

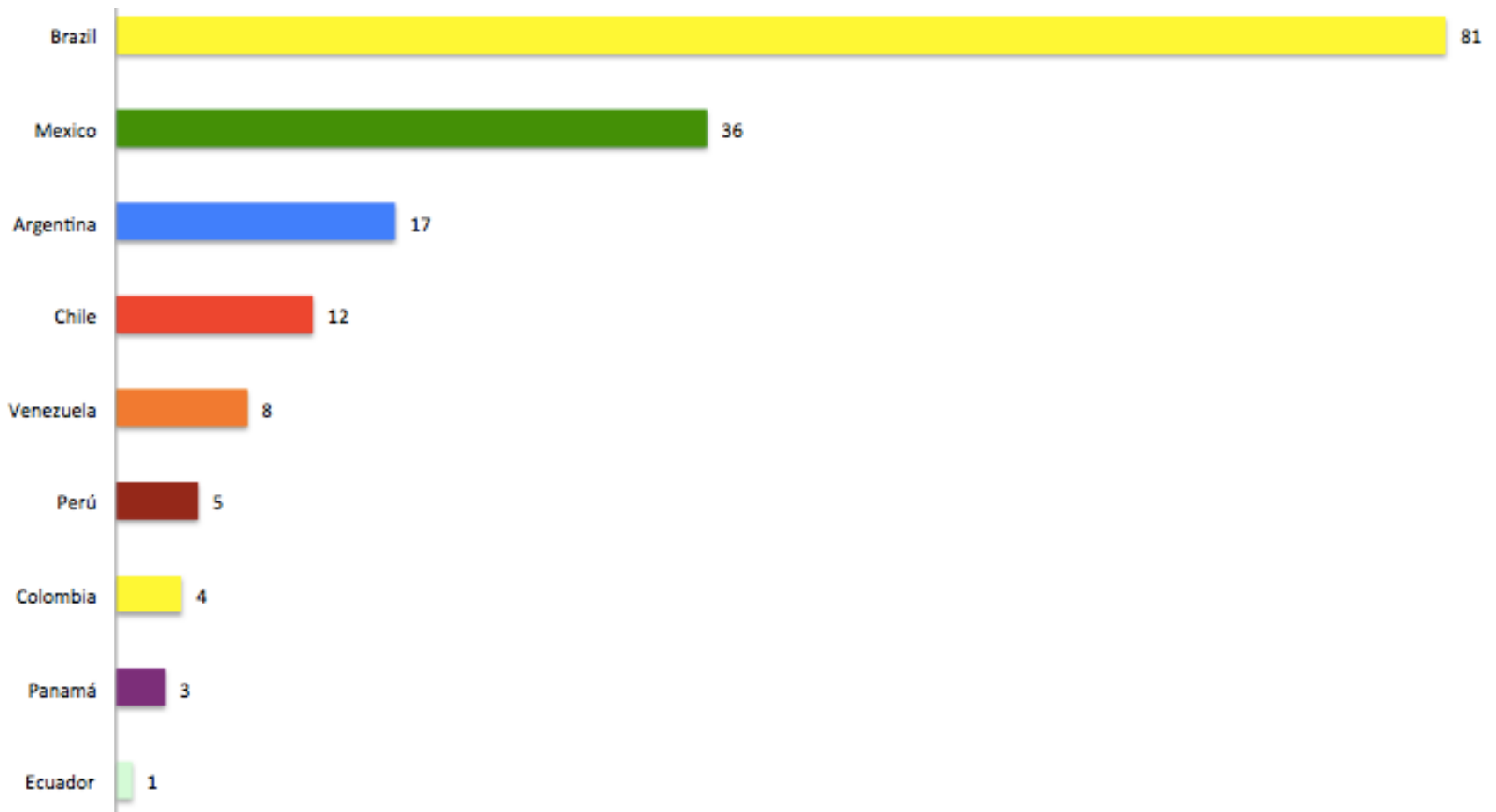
First Chilean Individual FCPA Case

- **Feb 4, 2016:** The CEO of Lan Airlines settled with the SEC charges that he violated FCPA when he authorized improper payments in 2006-2007 to a third-party consultant to settle a labor dispute in Argentina.
- The company wired \$1.15M in payments to the consultant's Virginia-based brokerage account (in addition to \$58K to the consultant's wife and son)
- The unsigned agreement falsely stated that the consultant would undertake a study of existing air routes in Argentina.
- The SEC's order instituting a settled administrative proceeding finds that Cueto violated the internal accounting controls, books and records, and false records provisions of the Securities Exchange Act of 1934.
- Without admitting or denying the findings, Cueto agreed to pay a \$75,000 penalty and must certify his compliance with the airline's policies and procedures by attending anti-corruption training among other undertakings.

FCPA sanctions against LATAM

- **July 25, 2016:** DOJ and SEC announced combined penalties of US\$22.2M against LATAM Airlines Group S.A. (“LATAM”) for FCPA violations taking place in Argentina.
- LATAM entered into a 3 year deferred prosecution agreement (DPA) with the **DOJ** to resolve the case. Under the DPA, LATAM agreed to: 1) pay a criminal penalty of US\$12,75M, 2) continue to cooperate with the DOJ’s investigation, 3) enhance its compliance program, and 4) retain an independent corporate compliance monitor for a term of at least 27 months.
- LATAM reached a settlement with the **SEC** under which it agreed to pay US\$6.74M in disgorgement and US\$2.7M in prejudgment interest.
- According the US authorities, the US\$22.2M in combined penalty, disgorgement and prejudgment interest far exceeds the US\$6.7M in savings the company had received from its improper payments.

Foreign Listed ADRs from Latin America



Source: <http://topforeignstocks.com/foreign-adrs-list/>

Take Away for Board Members

- Although board members have oversight rather than operational roles, the question remains: How might board members improve and demonstrate their oversight of this ever-increasing risk area?
- Board members should hone in on the following points:
 - (1) Set an appropriate, zero-tolerance “**tone at the top**”
 - (2) Understand the who, what, and why of the company’s FCPA-related risk assessment process and how that process impacts other aspects of their anti-corruption compliance program
 - (3) A Compliance Program “**should apply from the boardroom to the supply room**” – no one should be beyond reach.
 - (4) Receive an appropriate level of FCPA-compliance related training and communications
- Board members: should contribute to provide long term value to the company (reputation and culture of company are key!)

Directors Worst Nightmare? Front Page News for Alleged Illegal Conduct

The New York Times

Late Edition

Today, rain, becoming 55. Tonight, rain, flooded very windy, low 50. A couple of showers, but weather map appears

© 2012 The New York Times

NEW YORK, SUNDAY, APRIL 22, 2012

24 pages for the greater New York metropolitan area



Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle

An Internal Inquiry Was Shut Down, and the Authorities Were Not Notified

By DAVID BARSTOW

MEXICO CITY — In September 2005, a senior Wal-Mart lawyer received an alarming e-mail from a former executive at the company's largest foreign subsidiary, Wal-Mart de Mexico. In the e-mail and follow-up conversations, the former executive described how Wal-Mart de Mexico had orchestrated a campaign of bribery to win market dominance. In its rush to build stores, he said, the company had paid bribes to obtain permits in virtu-

agent, summed up their initial findings this way: "There is reasonable suspicion to believe that Mexican and USA laws have been violated."

The lead investigator recommended that Wal-Mart expand the investigation.

Instead, an examination by The New York Times found, Wal-Mart's leaders shut it down.

Neither American nor Mexican law enforcement officials were notified. None of Wal-Mart de

Wal-Mart has reportedly spent over **\$650M** on its internal investigation

Repercussions at Board Level

- Wal-Mart shareholders are still asking questions of the Board regarding its role in the ongoing scandal.
- ISS report: “*Shareholders should vote against these directors to send a clear message to the board that such poor oversight does not come without repercussions.*”
- Duty of Care (Caremark standard): the Board must make good faith efforts to ensure that a corporation has adequate reporting and information systems.
- But liability attaches only for “a sustained or systematic failure to exercise oversight” or “[a]n utter failure to attempt to ensure a reporting and information system.”
- Board must not only have a corporate compliance program in place but actively oversee that function.
- The board needs to ask the hard questions and be fully informed of the company’s overall compliance strategy going forward.

Dodd Frank Whistleblower Program 2010

- The whistleblower program is a part of the SEC's effort to **detect and prevent fraud**.

- The Whistleblower Program was created by Congress:
 - 1) To provide **monetary incentives** for individuals to **“voluntarily”** report possible violations of the federal securities laws to the SEC.
 - 2) **Prohibits retaliation** by employers against employees who provide the SEC with high quality, **“original”** information that leads to an enforcement action.

- Bounty based on total collected by SEC and related DOJ or Admin actions if SEC action collects **more than \$1M**.

- Bounty ranges from **10% to 30%** of sanctions recovered by Gov.

SEC Whistleblower Program Results

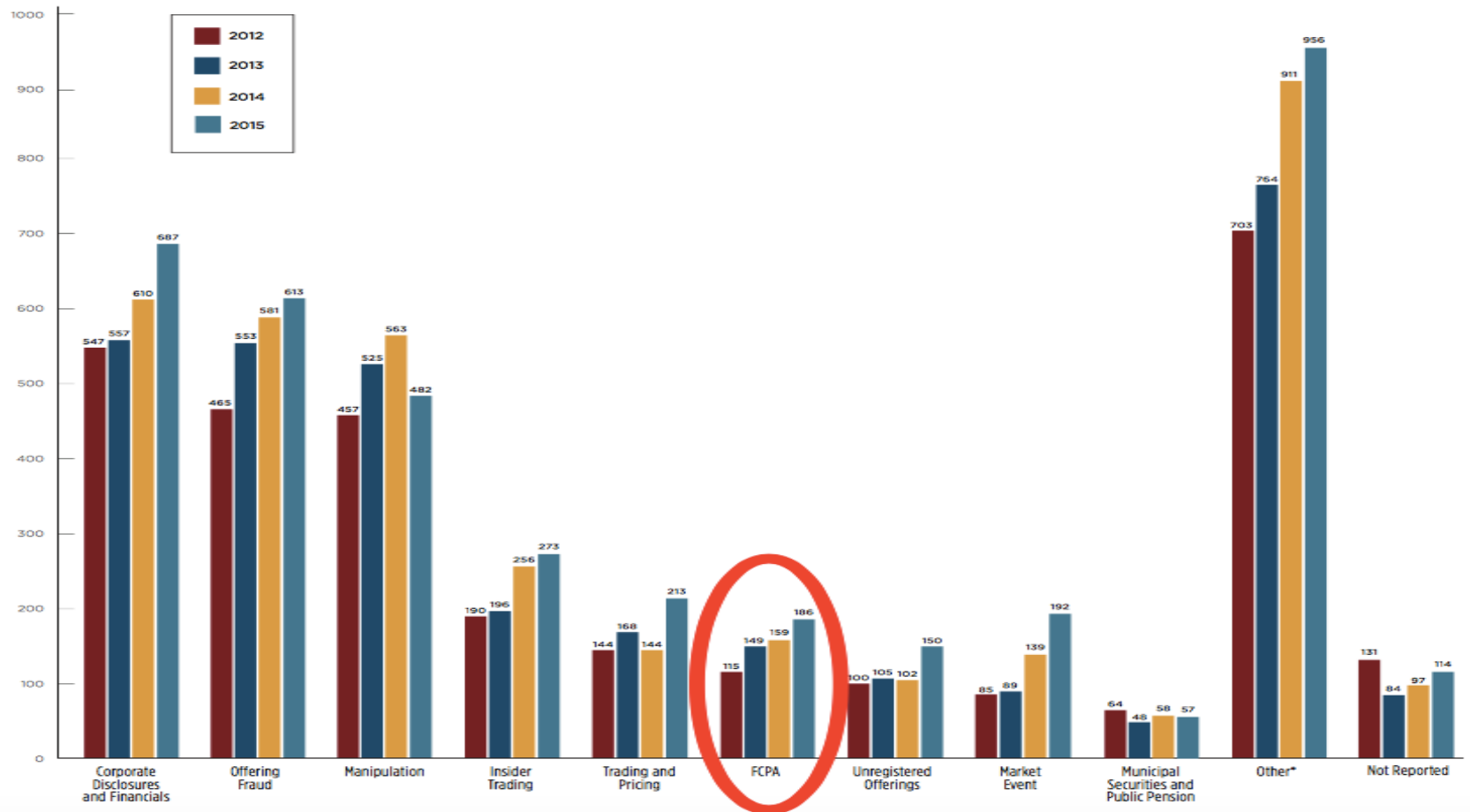
- The Whistleblower Office has received more than **14,000 tips** from the US and 95 foreign countries.
- The Commission has paid more than **US\$107M** to **33** whistleblowers since the Commission's new whistleblower rules went into effect in August 2011.
- In FY15, the SEC paid a whistleblower **US\$30M**, its largest payment to date & 4th award to a whistleblower in a foreign country.
- In FY15, the SEC received nearly **4,000 whistleblower tips**, a 30% increase over the number of tips received in Fiscal Year 2012, the first year for which they have full-year data.
- For the first time, in April '15, the Commission brought charges against a company for including language in confidentiality agreements that impeded whistleblowers from reporting to the Commission.
- Whistleblower is eligible for an award even if he reported internally as long as he/she reports the information to SEC within 120 days of reporting it internally.

SEC Whistleblower Program

	FY 2015
Balance of Fund at beginning of fiscal year	\$437,795,774.92
Amounts deposited into or credited to Fund during fiscal year	\$0.00 ⁶¹
Amount of earnings on investments during fiscal year	\$866,897.87
Amount paid from Fund during fiscal year to whistleblowers	(\$37,950,871.36)
Amount disbursed to Office of the Inspector General during fiscal year	(\$18,711.87)
Balance of Fund at end of the fiscal year	\$400,693,089.56

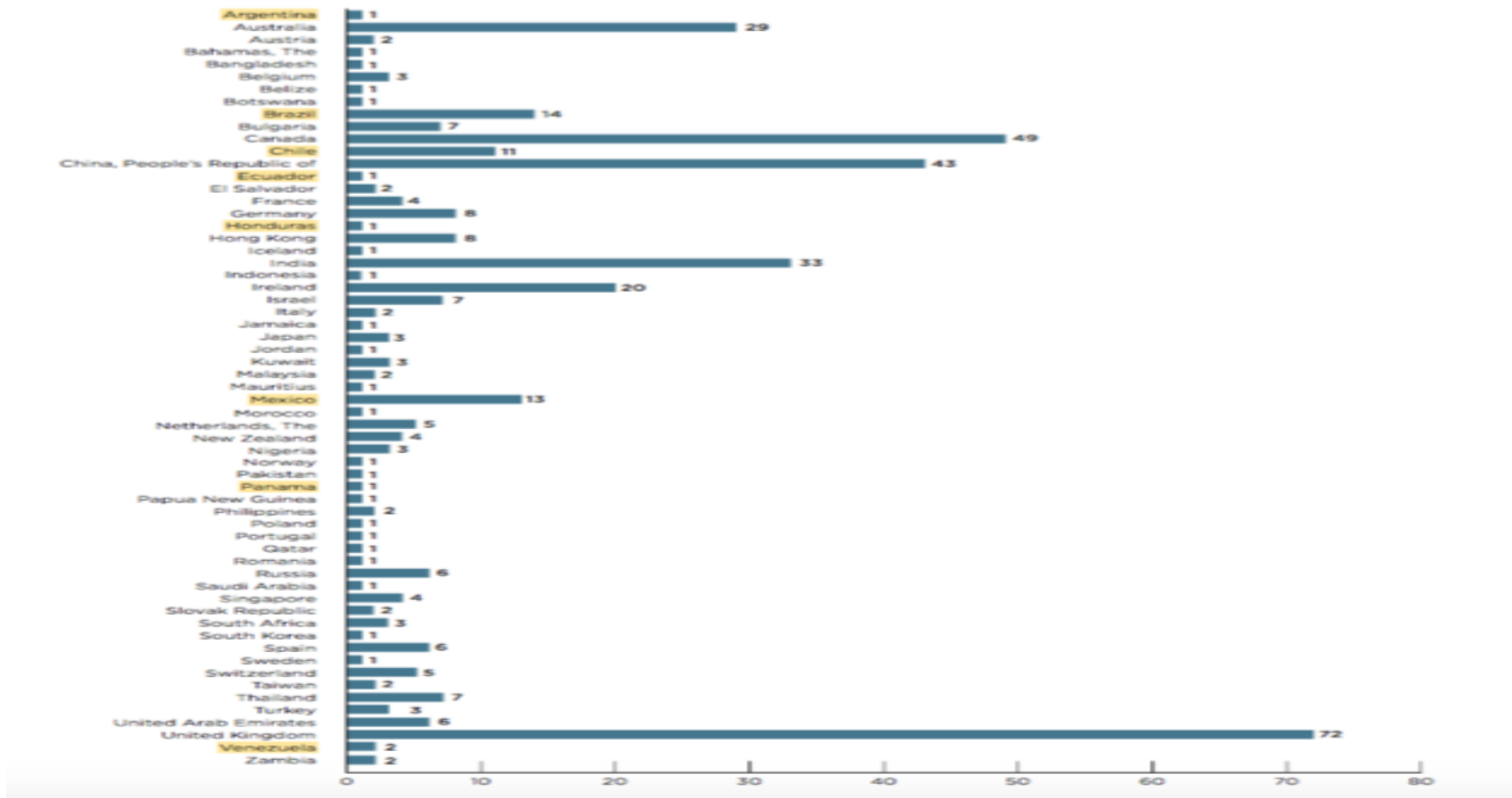
Source: SEC Office of the Whistleblower Annual Report 2015

WHISTLEBLOWER TIPS BY ALLEGATION TYPE



Source: SEC Office of the Whistleblower Annual Report 2015

INTERNATIONAL WB TIPS FROM LATIN AMERICA



Source: SEC Office of the Whistleblower Annual Report 2015