



FCPA and UK Bribery Act: 2013 Year-in-Review

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Presenters



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Agenda

- The FCPA – Enforcement Update
- The UK Bribery Act – Enforcement Update
- Compliance Tips

FCPA Enforcement Update

Aggressive Enforcement Activity Continues

- More SEC/DOJ collections from corporations than previous two years
 - SEC collected \$300 million
 - DOJ collected \$420 million
- More individual prosecutions than previous two years
- More attorneys dedicated to FCPA enforcement than ever (approximately 60)
 - Both DOJ and SEC have units dedicated to FCPA enforcement
- Continued pipeline of public companies reporting existence of FCPA investigation (more than 90)

Two “Top 10” Cases in 2013

- Total, S.A. – \$398 million (\$245MM crim.; \$153MM civil)
 - \$60 million in bribes to Iranian official (1995-2004)
 - DPA with compliance monitor
 - France criminal charges dismissed after trial; but retrial ordered
- Weatherford – \$153 million (\$87MM crim.; \$66MM civil)
 - 3 subsidiaries pleaded guilty to FCPA and export violations
 - \$100 million additional penalty for export violations
 - Parent agreed to DPA with compliance monitor for 18 months
 - Loose internal controls permitted bribery in Africa and Middle East
 - Use of joint venture, freight forwarder, distributor, kickbacks (Oil-for-Food), improper travel and entertainment to pay bribes
 - Failed to investigate allegation of bribes on ethics questionnaire
 - \$1.875MM penalty to SEC for failure to cooperate early

Archer Daniels Midland Company (ADM)

- \$54 million (\$18MM crim.; \$36MM civil)
- Subsidiary pleaded guilty
 - Sub paid to get Ukraine to pay the VAT rebate that the Sub was legitimately owed
 - Jurisdiction based on “while in the territory of the United States;” references emails but no instance in which this Sub’s employees were in the U.S. to further bribes
- ADM entered NPA
 - Ukraine facts plus Venezuela issues
 - Had opportunity to fix in 2004, but bribe payments continued

Bilfinger SE

- German company, not a U.S. issuer or domestic concern, paid \$32 million
- Agreed to DPA based on three counts
 - Conspiracy to violate the FCPA – conspired with U.S. company to violate FCPA
 - Two substantive FCPA violations – aided and abetted U.S. company’s substantive violations
- “A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.”
 - DOJ/SEC FCPA Guidance Manual

Diebold Inc.

- Paid \$48 million in October 2013 to settle civil and criminal allegations
- Used Chinese subsidiary to spend \$1.6 million for travel and entertainment to state-owned bank officials
 - Paris, Amsterdam, Florence, Rome, the Grand Canyon, Napa Valley, Disneyland, Las Vegas
 - Called trips “training”
- Cash gifts from \$100 to \$600 given as well
- Diebold executives on notice but did not take action
 - Individual prosecutions likely to follow

Direct Access Partners

- SEC-registered broker-dealer
- Three senior executives pleaded guilty of FCPA and money laundering charges
 - Paid \$5 million to VP at Banco de Desarrollo Economico y Social de Venezuela (BANDES)
- VP in Venezuela pleaded guilty of Travel Act and money laundering violations
 - Arrested on trip to visit DAP
- Periodic examination of the books in 2010 led to discovery of fraud and bribery

Aggressive Enforcement Expected to Continue

- “Top 10 quality cases” expected to be brought in 2014
 - Chuck Duross, DOJ’s former FCPA Unit Chief
- Alcoa entities pay \$384 million (\$223 crim.; \$161 civil)
 - Started in 1988
 - More than \$110 million in bribes to Bahraini officials
 - Thanked Switzerland, Guernsey, Australia, UK authorities for assistance in prosecution
 - No mention of huge set-back in UK prosecution of individual

Industry-wide Investigations

- SEC admits to sometimes looking at industries and determining whether to “probe more carefully”
 - Kara Brockmeyer, SEC FCPA Unit Chief
 - Medical device industry, e.g.
- DOJ admits to “following the evidence where it goes” based on what a company might say that its competitors also do
 - Chuck Duross, DOJ FCPA Unit Chief

GlaxoSmithKline

- Chinese authorities detained four GSK executives in July 2013
- Allegations that GSK funneled \$490 million to doctors in China through 700 travel agencies in exchange for sales of drug products
- GSK officials allegedly have confessed that they used middlemen who helped stage conferences and overcharged for them and the middlemen then used the extra money to pay the bribes.
- Chinese papers report that the investigation found that GSK's alleged bribery of doctors “was coordinated by the British company and was not the work of individual employees.”

GSK (cont.)

- Spread further – Chinese investigations of Sanofi, AstraZeneca, UCB, Baxter, Novartis, Novo Nordisk
 - Specific allegations include that Eli Lilly & Co. paid 30 million yuan (\$4.9 million) to doctors to promote its insulin products.
 - In August 2013, Baxter International Inc. said it investigated whistleblower allegations and found improper expense payments by a China joint venture.
- GSK opened internal investigation and is coordinating with both U.S. and UK officials
- UK and U.S. authorities now investigating GSK and industry for similar potential wrong-doing

Princelings

- JPMorgan Chase is being investigated whether the hiring of the children of Chinese officials related to business generation
 - Hired the son of the chairman of the China Everbright Group, a China state-controlled conglomerate, and won business from the group that included a stock offering by a subsidiary.
 - Hired the daughter of a Chinese railway official. The bank went on to help China Railway raise more than \$5 billion in its 2007 IPO.
- In July 2013, Qualcomm announced: “instances in which special hiring consideration, gifts or other benefits...were provided to several individuals associated with Chinese state-owned companies or agencies.”

Going After Individuals

- 12 of 19 DOJ actions filed against individuals
- Indicted 4 execs. of BizJet International Sales and Support, Inc.
 - Peter DuBois and Neal Uhl pleaded guilty, offered substantial assistance and received probation and home detention
 - Two others have not been arraigned (outside of U.S.)
 - BizJet settled in 2012 with a \$11.8 million criminal fine and a three-year DPA
- 4 execs. related to Direct Access Partners LLC
- 3 execs. related to Alstom SA (another pleaded guilty in 2012)

Watch Out Foreign Nationals

- Arrested Frederic Cilins, French citizen, on trip to U.S.
 - Charged with obstruction of justice related to DOJ investigation into alleged bribe payments made to Guinea's former President
 - Held without bail
- Arrested Frederic Pierucci, French citizen, as he arrived in U.S.
 - David Rothschild (U.S. citizen) had pleaded guilty (unsealed indictment after arrest)
 - Additional French executive, William Pomponi, charged later
 - In connection with alleged bribes in 2002 by French power generation company (Alstom?) to Indonesian parliament member
- Indicted Alan Riedo, Swiss citizen
 - Charged with bribery in China for Maxwell Technologies, Inc.

Declinations

- As a result of voluntarily-disclosed conduct
 - Dyncorp Int'l Inc. – DOJ; 3 ½ years
 - Raytheon Co. – DOJ/SEC; 1 year
 - 3M Co. – DOJ/SEC; 4 years
 - Wynn Resorts, Limited – SEC; 2 years
 - Owens-Illinois Group Inc. – DOJ; 1 year
- As a result of government-initiated investigation
 - Deere & Co. – SEC; 2 years
 - Zimmer Holdings Inc. – DOJ/SEC; 5 years
 - Medtronic Inc. – DOJ/SEC; 5 years
 - Nabors Industries Ltd. – DOJ/SEC; 6 years
 - IDT Corp. – DOJ/SEC; 2 years
 - Allied Defense Group Inc. – DOJ/SEC; 3 ½ years

Civil Jurisdictional Issues

- SEC v. Elek Straub, Andras Balogh, Tamas Morvai
 - Denied motion to dismiss no connection to U.S.
 - Emails were routed through U.S. servers (interstate commerce)
 - Denied motion to dismiss for lack of personal jurisdiction
 - False certifications to auditors evidenced an intent to cause injury in the U.S. (ADRs)
 - Not unreasonable to assert jurisdiction

Civil Jurisdictional Issues

- SEC v. Herbert Steffen
 - Granted motion to dismiss for lack of personal jurisdiction
 - “Absent any alleged role in the cover ups themselves, let alone any role in preparing false financial statements the exercise of jurisdiction here exceeds the limits of due process”
- Default judgment against Siemens executives Signer and Bock
 - each to pay a \$524,000 civil penalty and Bock to pay an additional \$413,957 for disgorgement

Dodd-Frank Whistleblower Provisions

- Whistleblowers who
 - “Voluntarily” provide the SEC with
 - “Original information”
 - That leads to a “successful enforcement” action in a federal or administrative court
 - That results in monetary sanctions greater than \$1,000,000
- Are entitled to a mandatory award from the SEC between 10 and 30% of the monetary sanctions

Dodd-Frank Whistleblower Statistics

- In its 2013 fiscal year, the SEC received 3,238 whistleblower tips
 - Possible corporate disclosure/financial statements and offering fraud accounted for one third of the tips
 - 149 tips with respect to FCPA violations; up from 115 in 2012
 - Tips received from all 50 states and 55 foreign countries
- Sept. 30, 2013, awarded \$14 million to a whistleblower, the largest amount ever

Changes to the FCPA?

- “We are unequivocally opposed to weakening the Foreign Corrupt Practices Act. We don’t need to lower our standards. We need to work with other countries to raise theirs.”
 - Secretary of State Hillary Clinton, Transparency International-USA's Annual Integrity Award Dinner, March 22, 2012
- “I want to be clear about one thing with respect to [proposals to amend the FCPA]: we have no intention whatsoever of supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery.”
 - Ass’t Attorney General Lanny Breuer, November 8, 2011

FCPA Opinion Procedure Release 2013-01

- No enforcement action for U.S. Law Firm partner to pay medical expenses of daughter of foreign government attorney (FGA):
 - FGA does not and will not play any role in the decision to award legal business to Firm
 - Requestor and FGA have informed their respective employers of the proposed gift and neither has objected (Foreign AG has expressly stated that the proposed gift will not affect the decision to award work to Requestor's Law Firm and is not illegal under Foreign Country A's laws)
 - Partner is paying out of personal pocket and directly to medical provider

UK Bribery Act Enforcement Update

The UK Bribery Act

- Came into force 1 July 2011 – prior anti-corruption laws still apply to activities before that date
- Affects UK companies, as well as non-UK companies and their non-UK affiliates that do business in the UK
- Covers private and public bribery and acceptance of bribes, both domestic and overseas
- Both individual and company liability
- Unlike the FCPA, no exception for facilitation payments – prosecutorial discretion
- No statutory exception for business hospitality and travel expenses – guidance and prosecutorial discretion

Facilitation Payments

- The UK Bribery Act prohibits facilitation payments
 - Also prohibited under prior corruption laws, although no prosecutions brought
- Although there is some recognition in Ministry of Justice guidance that facilitation payments won't end overnight, the SFO has taken a harsher line since the advent of its new director in May 2012 and withdrawn its previous guidance
- Q&A suggests some flexibility remains and SFO is primarily interested in serious and complex cases
- What about the Crown Prosecution Service, which is not limited to serious and complex cases?

Shareholder Liability

- Generally shareholders not liable for acts of bribery by affiliates without collusion or unless the affiliate is performing services for or on behalf of the shareholder
- Use of civil recovery order under the UK's Proceeds of Crime Act (POCA) to recover dividends paid to shareholders
- Mabey Engineering (Holdings) Limited – paid £130,000 in January 2013 sums received through dividends derived from unlawful conduct (UN sanctions)
- SFO intention to seek similar orders in the bribery context, with focus on institutional investors -- better able to conduct due diligence
 - Oxford Publishing Limited civil recovery order for dividends generated through improper payments of subsidiaries in Tanzania and Kenya
- Possible private prosecutions? (Virgin)

Enforcement: OECD/TI Progress Reports

- The U.S. still leads the league in enforcement, but enforcement increasing in other jurisdictions -- since 1999 through the end of 2012, 221 individuals and 90 entities have been sanctioned under criminal proceedings in 13 of the 40 OECD Convention signatory countries
- Active enforcement: US, Germany, UK and Switzerland
- Moderate enforcement: Italy, Australia, Austria and Finland
- Limited enforcement: France, Canada, Sweden, Norway, Denmark, Hungary, South Africa, Argentina, Portugal and Bulgaria
- Little or no enforcement: Japan, Netherlands, Korea, Russia, Spain, Belgium, Mexico, Brazil, Ireland, Poland, Turkey, Czech Republic, Luxembourg, Chile, Israel, Slovak Republic, Greece, Slovenia, New Zealand and Estonia

UK Enforcement

- TI reports that 20 cases have been commenced since 2009, all of which were major cases
- The SFO has been reported to have 9 ongoing investigations relating to matters that pre-date the Bribery Act
- It is said to be investigating just 2 cases relating to the Bribery Act and has just 3 other matters under development that have yet to lead to a prosecution
- Meanwhile, the City of London police confirm investigation of 25 individual cases of bribery since the formation of its Overseas Anti-Corruption Unit and some 28 suspects and one corporate entity have been charged, with some Bribery Act cases beginning to filter through
- New International Foreign Bribery Task Force established May 2013: London Police, Australian police, FBI, Canadian Mounties

UK Enforcement

- On 14 August 2013, the Serious Fraud Office (SFO) announced its first prosecution under the Bribery Act
 - 3 individuals connected with Sustainable AgroEnergy plc (now bankrupt) for making and accepting bribes in connection with the promotion and sale of bio fuel investment products to UK investors (likely commercial domestic bribery)
- Before that, 3 individuals were prosecuted under the Act by the Crown Prosecution Service and convicted
 - A cab driver, a junior Ministry of Justice official and student

UK Enforcement

- There has yet to be a corporate prosecution under the UK Bribery Act – but there are investigations
 - GPT (an affiliate of EADS) relating to Saudi Arabia
 - ENRC – a UK listed company that has since gone private
 - Also subject to an FCPA investigation in the US
 - Rolls Royce for bribes allegedly paid in China and elsewhere
 - News International – alleged bribes paid by journalists to police officers
 - Also subject to an FCPA investigation in the US
- There has also been increased UK enforcement activity under prior corruption and current anti-money laundering laws – fines, and jail time for individuals, as well as civil recovery under money laundering laws

UK Enforcement

- Guilty pleas in corporate criminal cases under the prior corruption laws: Mabey & Johnson and Innospec (both foreign bribery), and BAE Tanzania (insufficient accounting records)
- Because of court criticisms of plea agreements, since Innospec, foreign bribery enforcement actions against corporations have been exclusively through civil recovery orders

Some Recent Cases

- Mabey Engineering (Holdings) Limited – paid £130,000 in January 2013 in recognition of sums received through dividends derived from contracts won through unlawful conduct
- BAE Systems concluded its settlement payment to Tanzania in March 2013, part of an earlier settlement with the SFO
- JLT Specialty, a division of insurance company Jardine Lloyd Thompson Group, was fined £1.8 million by the Financial Conduct Authority (FCA) in December 2013 for having an "unacceptable" approach to bribery in overseas markets



Some Recent Cases

- EFG Private Bank Ltd, £4.2 million FCA fine for control systems failures in April 2013
- Smith & Ouzman Ltd, the UK's largest security printer, and 2 directors, an employee and agent charged with corrupt payments to obtain business in various African countries between 2006-2010 – trial set for November 2014

Dahdaleh/ Aluminium Bahrain (Alba) Case

- The SFO's case against Victor Dahdaleh collapsed after two witnesses from the law firm of Akin Gump refused to appear and another witness changed his testimony
 - Akin Gump lawyers were slated to testify about their investigation into Dahdaleh's dealings with Alba, whom they represented
- The SFO had accused Dahdaleh of paying \$67 million in bribes to former managers of Alba in return for raw material supply contracts for Alcoa worth over \$3 billion
- Less than 6 weeks after the collapse of this case, Alcoa's subsidiary pleaded guilty in the US to a bribery offence and agreed to pay \$384 million in a joint settlement with the DOJ and SEC (it had already paid \$85 million to Alba to settle another civil claim)

SFO Challenges

- Negative publicity: historic internal management practices, overpayment of departing senior executives, loss of data in the BAE Systems case
- Tchenguiz brothers claims of improper prosecution in connection with the collapse of the Icelandic bank Kaupthing – seeking damages (£300 million)
- Collapse of the Dahdaleh case – costs/lawyers fees?
- Budgetary and resource constraints -- annual budget only around £32 million (about \$50 million) – although additional allocations may be possible for more complex cases
 - HM Treasury provided additional funding in January 2014 in connection with the SFO's investigation of Rolls Royce
 - Now seeking emergency funding of £19 million including to cover LIBOR, Rolls Royce and Barclays/Qatar cases, Tchenguiz costs

Plea Bargains

- Current uncertainties in the UK about plea bargaining
 - A defendant in the UK may negotiate and reach an agreement in principle with the prosecutor before entering a guilty plea and being sentenced, but certain rules must be followed – must be reasonable and just and reflect the seriousness of the crime and give the court adequate sentencing powers: the court plays a key role
 - The defendant and the prosecutor can make a joint submission on the appropriate sentencing range, but cannot agree on or submit a specific sentence: The court is the final decision maker on the sentence

Plea Bargains

- In the Innospec case, which reflected a global settlement with the US Department of Justice, the SFO agreed to seek a specific sentence
 - Although the court reluctantly agreed in that case, it severely criticised the practice, sending a message that this sort of thing would not be permitted in the future
- In the Dougall case involving an individual whistle-blower who was involved in bribery, the court refused to follow the recommendation of the SFO for leniency and imposed a jail sentence (suspended on appeal)

Deferred Prosecution Agreements

- New legislation to permit deferred prosecution agreements (DPAs) available to prosecutors now (from 24 February 2014)
- Available for corporate bodies, partnerships and unincorporated associations, but not individuals
- Proceedings are instituted by indictment charging the offence but are automatically suspended – while in place, no other person may prosecute
- After negotiations commenced, but before the terms are agreed, the prosecutors must apply to the court for a declaration that entering into the DPA is in the interest of justice and the proposed terms are fair, reasonable and proportionate
- Court approval required for final terms and any variations

Deferred Prosecution Agreements

- Content of a DPA
 - Statement of facts (treated as admissions in criminal proceedings)
 - Requirements imposed may include:
 - ££ penalty – to be broadly comparable to fine that a court would impose for conviction
 - Victim compensation or donation to charity or third party
 - Disgorgement of profits
 - Compliance program implementation
 - Cooperation in investigation
 - Ongoing monitoring
 - Consequences of failure to comply with a term of the DPA
 - Prosecution costs to be paid by Defendant
- Prosecutor may apply to the Court to decide on the “balance of probabilities” that there has been a failure to comply
 - Consequence can be agreed remedies (must be approved by the Court) or termination of the DPA – nb. statement of facts treated as admissions

Deferred Prosecution Agreements

- Guidance and Rules
 - The Director of Public Prosecutions and SFO Director have published a joint Code of Practice providing guidance to prosecutors on whether a DPA is likely to be appropriate and other relevant matters
 - New corporate Sentencing Guidelines also published (individual guidelines to be published later) – previously none for bribery offences or corporate liability – will come into effect 1 October 2014
 - The Criminal Procedure Rules Committee has also published procedural rules for the DPA application and approval process
 - includes requirement for parties to DPA (including prosecutor) to make formal declarations to court that info supplied is accurate & complete
 - includes provision for the court to order one party to pay the other's legal costs in proceedings about breach or variation of DPA

New National Crime Agency

- The Crime and Courts Act 2013 established the new National Crime Agency (NCA), which replaces the Serious Organised Crime Agency (SOCA) and is responsible for leading the UK's fight to cut serious and organised crime
- Both policing and coordinating role, with the power to compel assistance from regional forces and SFO – but SFO Director has role in determining NCA strategic priorities
- The SFO remains the lead agency for complex cases of corporate bribery and corruption – turf war?
- But the Home Office will take control of all anti-corruption policy and the new NCA will lead on the assessment of bribery and corruption by organised crime – a channel of communication with the FCA and SFO

Voluntary Disclosures

- Prior SFO guidance which had suggested the possibility of civil, rather than criminal resolution in the case of a voluntary disclosure was withdrawn by the new SFO Director – focus on prosecution
- Still encouraged, but no guarantees
 - May be a factor in tending against prosecution if genuinely proactive and forthcoming with remedial action
 - Failure to report timely may be a factor in favour of prosecution, however
- Possibility of multiple enforcement and disclosures in other jurisdictions may affect decision

Things to Come?

- New whistle blowing incentive scheme proposed
- SFO talk of extending strict corporate liability for failure to prevent bribery by associated persons to include failure to prevent acts of financial crime by associated persons (persons who perform services for or on behalf of the company)
 - Aimed at counteracting the problem of the “identification theory” in normal English criminal jurisdiction where a legal person is only criminally liable if its “directing mind” (directors, senior officers) had the requisite *mens rea* to commit the crime, making it difficult to prosecute companies
- Closer international cooperation – various MOUs between enforcement authorities

Compliance Tips

Compliance Programs

- One size does not fit all
- Requires a careful analysis of your business and an identification of your risks
- Risk of multiple enforcement requires consideration of other anti-corruption laws like the UK Bribery Act
- Best practices are evolving
- Counsel or the head of compliance should be sure to stay on top of best practices and consider whether they are appropriate for his or her company

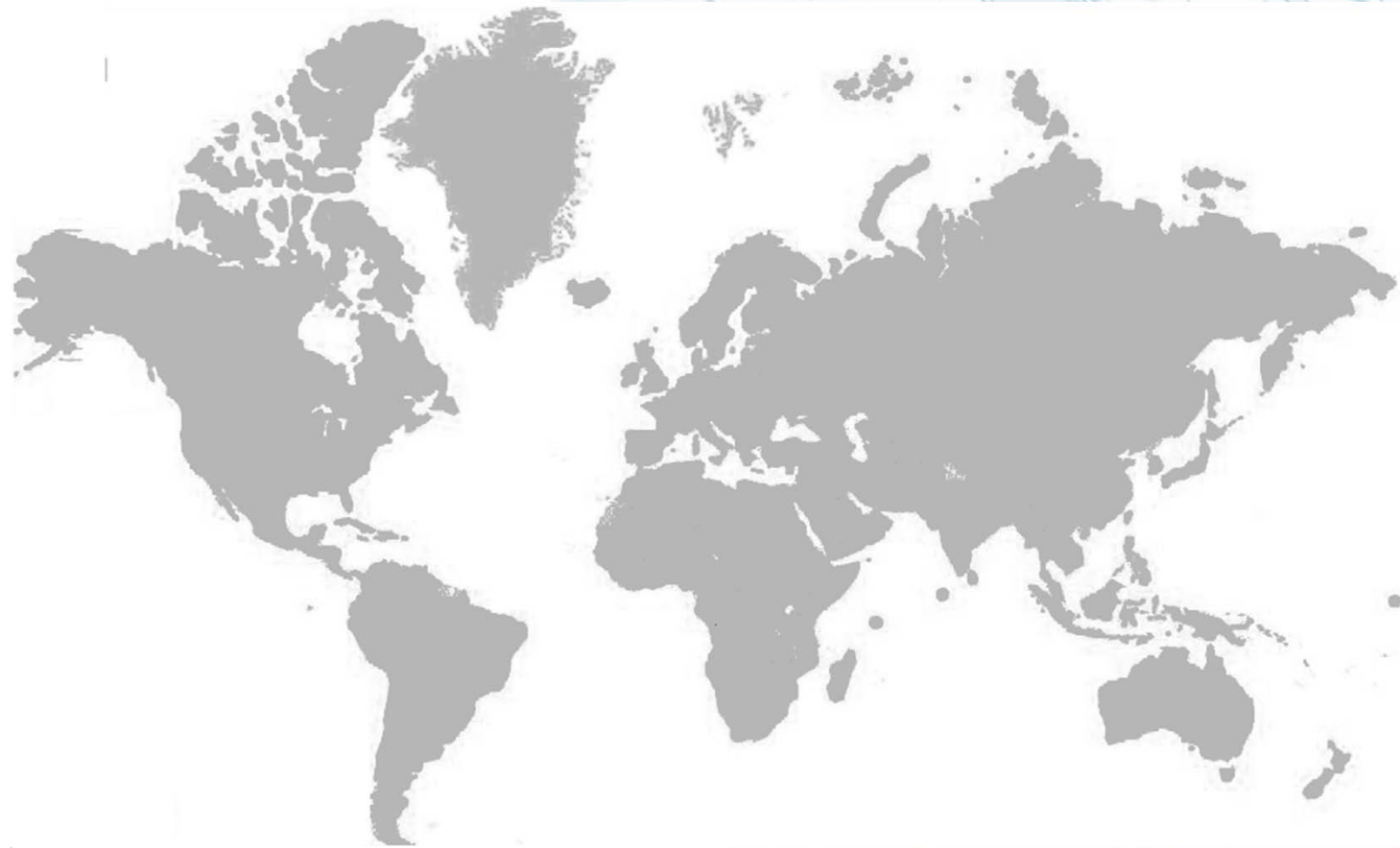
Essential Elements

- Commitment from senior management and a clearly articulated policy against corruption – tone at the top
- Code of conduct and compliance policies and procedures
- Oversight, autonomy, and resources
- Risk assessment
- Training and continuing advice
- Incentives and disciplinary measures
- Third-party due diligence and payments
- Confidential reporting and internal investigation
- M&A pre-acquisition due diligence and post-acquisition integration

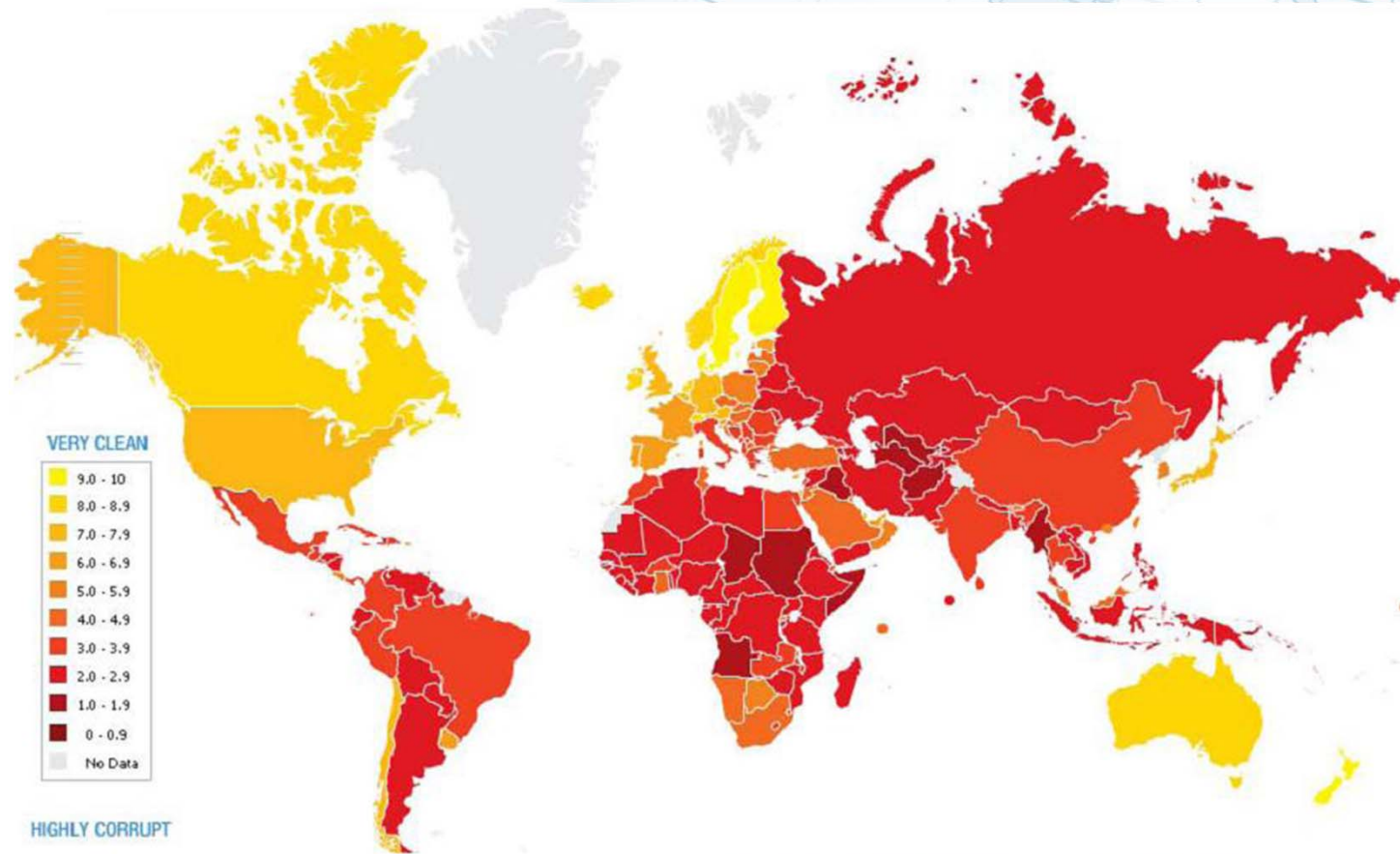
Risk Assessment

- At a minimum, risk assessments should ask the following questions:
 - Do I do business in countries with a reputation for corruption?
 - Do I do business with state-owned enterprises?
 - Does my business require licensing or permits by local authorities?
 - Do I need to deal with customs or other import authorities?
 - Do I use third party agents or distributors?
- Risk assessments should consider qualitative and quantitative factors
- After you answer these questions, you can begin to design an appropriate anti-corruption compliance program

You see...



Prosecutors see



Questions and Answers

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