

The Foreign Corrupt Practices Act: A Primer And Enforcement Update

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*A Broader Perspective*SM

Presenters



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Agenda

- Primer on the FCPA
- Enforcement Update
- Compliance Tips

Structure of FCPA

Antibribery Provisions

- Prohibits bribery of foreign government or political officials for the purpose of obtaining or retaining business or securing any improper business advantage
- Mainly enforced as criminal violations by the Department of Justice

Books and Records Provisions

- Requires SEC-registered or reporting issuers to make and maintain accurate books and records and to implement adequate internal accounting controls
- Mainly enforced as civil violations by the Securities and Exchange Commission

Antibribery Prohibited Acts

- It is unlawful for
 - an “issuer,” “domestic concern,” or “any person acting within the territory of the United States”
 - with “corrupt intent”
 - directly or indirectly
 - to offer, pay, promise to pay, or authorize payment
 - of “anything of value”
 - to a “foreign official”
 - for the purpose of obtaining or retaining business

To Whom Do the Antibribery Provisions Apply?

- Any “**issuer**” that files reports to the SEC or trades equity or debt on a U.S. exchange
 - Includes any foreign company that trades, for example, American Depository Receipts (ADRs), on a U.S. exchange.
- Any “**domestic concern**”
 - Includes U.S. citizens, nationals, and residents as well as any entity (corporation, partnership, etc.) that is organized under the laws of the United States or a U.S. territory or that has its principal place of business in the United States.
- Any “**person**,” including an organization, wherever located, that, while in the territory of the United States, does any act in furtherance of the prohibited conduct
 - Government argues minimum contacts include emails, telephone calls, transfers through correspondent bank accounts in U.S. intermediary banks
 - But see Patel case

But what about foreign subsidiaries?

- Any issuer or any domestic concern

or for any **officer, director, employee, or agent** of such issuer or domestic concern or any **stockholder** thereof acting on behalf of such issuer or domestic concern

- If the foreign subsidiary is acting as an agent of a U.S. issuer or domestic concern, then it is covered

“Corrupt Intent”

- Corrupt intent is required
- Quid Pro Quo – easy enough when payment is made directly to foreign official
- FCPA also prohibits corrupt payments to:
 - **any person**, while **knowing** that all or a portion of such money or thing of value will be offered to foreign official directly or indirectly
- “Knowing” includes having a **firm belief** that something will happen
 - Knowledge is established if a person is aware of a **high probability** of the existence of such circumstance, unless the person actually believes that such circumstance does not exist
 - Willful blindness instructions are appropriate in FCPA cases

Case Study of Knowledge

- United States v. Bourke
 - Co-investors in Azeri investment deal prosecuted
 - Bourke did not pay or authorize the payment of bribes
 - Bourke lost his entire \$8 million investment
 - Bourke complained to Azerbaijan and U.S. officials
 - The government argued that he knew or should have known his co-investor was paying bribes to foreign officials
 - Willful blindness was sufficient to support a conviction
 - Juror: “It was Kozeny, it was Azerbaijan, it was a foreign country. We thought [Bourke] knew [about the bribery] and definitely could have known. He’s an investor. It’s his job to know.”
- **Guilty** of conspiracy to violate the FCPA and the Travel Act
- Second Circuit upheld conviction in December 2011

Direct or Indirect Payments Covered by Law

- Statute prohibits unlawful payments directly or indirectly through a third party
- Many enforcement cases involve indirect payments
- Examples of third parties through whom illegal payments have been made:
 - Agents or consultants
 - Distributors
 - Joint venture partners
 - Lawyers/accountants
 - Service providers

Does a Payment Need to Be Made?

- **No**
- Offers, promises, or authorizations to make prohibited payments are just as illegal as actually making a prohibited payment
- The simple offer of a payment is enough to create liability

What Qualifies as “Anything of Value”

- Anything of Value = Any Benefit
- Examples include but are not limited to:
 - Cash or the equivalent of cash such as a gift card, voucher, coupon
 - Entertainment or travel
 - Gifts that are more than a mere token or modest in value
 - Educational opportunities
 - Contributions to political parties, causes, candidates, and officials
 - Charitable contributions
 - Investments or property
 - Loan of a vacation home, automobile, or yacht, etc.
 - Giving a job to a family member or someone with a close personal relationship with foreign official

How Is “Foreign Official” Defined?

- Very Broadly
- Statutory definition includes:
 - Foreign government employees or officials
 - Political officials or members of their staffs
 - Employees of public international organizations
 - Candidates for political office
- Has also been interpreted by DOJ to include:
 - Employees of government-owned or government-controlled businesses
 - Examples include:
 - Employees of state-owned or state-controlled hospitals
 - Employees of state-owned or state-controlled media outlets, e.g. Chinese journalists
 - Employees of sovereign wealth funds

What Is an Unfair Business Advantage?

- In order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person
- Focus is on gaining a competitive advantage rather than directly securing a particular contract
 - Examples include:
 - Slotting on planes and faster customs clearance
 - Lower customs and tax duties caused lowered expenses and gave a business advantage over competitors in market
 - Government reports and certifications to sell seed
 - Preferential treatment in customs clearance
 - Influence on technical specifications to influence bid
 - Influence over legislation
- The bribe does not need to achieve its intended effect

Are There Any Exceptions?

- Purpose of payment must be to expedite or secure performance of “routine governmental action” by a foreign official
 - *Action must be “ordinarily and commonly performed” by the foreign official*
- Examples
 - Obtaining permits, licenses, or other official documents
 - Processing governmental papers, such as visas and work orders
 - Providing police protection
 - Mail pick-up and delivery
 - Providing phone service, power and water supply
 - Loading and unloading cargo
 - Protecting perishable products
 - Scheduling inspections associated with contract performance or transit of goods across country
- **BUT** some companies no longer allow these types of payments
- **AND** facilitating payments are not always permitted under local foreign law

“Affirmative Defenses” Under the FCPA

- Promotional Payments
 - “Reasonable and bona fide” expenses
 - promotion, demonstration, explanation of products
 - execution or performance of contract
 - Proper documentation of expenditures
- “Lawful” under local law
 - Has never been recognized as a defense to a payment prohibited by the FCPA
 - Recently argued and rejected in *Bourke*

Books and Records

- Books, records, and accounts must be kept in reasonable detail to accurately and fairly reflect transactions and dispositions of assets
- System of internal accounting controls in place to ensure that
- Applies to issuers
 - Parent companies may be liable for false or fraudulent entries on any book or record that is ultimately consolidated with an issuer's books and records for financial reporting purposes
 - If issuer holds 50% or less of the voting power of subsidiary, then issuer must proceed in **good faith** to use its influence to cause subsidiary to meet internal accounting controls requirement

Penalties for Violation of FCPA Provisions

- Significant Monetary and Criminal Penalties
 - Antibribery Violations
 - Fines up to \$2 million per violation
 - Culpable individuals may face fines of up to \$250,000 per violation and/or imprisonment for up to five years
 - Books and Records and Internal Control Violations (Willful)
 - Corporate fines in excess of \$25 million for a company
 - Fine up to \$5 million and/or imprisonment for up to 20 years for culpable individuals
 - Alternative Fines Statute, 18 U.S.C. § 3571(d)

Possible Collateral Consequences of FCPA Violations

- Termination of government licenses
- Debarment from government contracting programs
- Disgorgement of a company's profits on contracts secured with improper payments
- Tax implications
- Shareholder litigation
- Foreign enforcement actions
- Appointment of independent compliance monitors
- Personal liability; officer and director bars for individuals

Enforcement Update

Large penalties

- JGC Corporation – \$218.8 million
- Jeffrey Tessler – \$149 million (forfeited)
- Magyar Telekom/Deutsche Telekom – \$95 million
- Johnson & Johnson – \$70 million
- Marubeni Corp. – \$54.6 million

Bonny Island plant, Nigeria

- The Companies:
 - Kellogg, Brown & Root – \$579 million
 - Snamprogetti Netherlands B.V./ENI S.p.A. – \$365 million
 - Technip S.A. – \$338 million
 - JGC Corporation – \$219 million
- KBR CEO and JV Steering Committee Member:
 - Jack Stanley – 30 months in prison; restitution \$11 million
- The Agents:
 - Marubeni Corporation – \$55 million
 - Jeffrey Tesler – 21 months in prison; forfeited \$149 million
 - Wojciech Chodan – Probation

FCPA Trials

- 22 Defendants in SHOT Show case
 - 2 Trials – 2 Not Guilty; 1 Dismissed; 7 Hung Jury
 - 3 guilty pleas
 - Court dismissed entire case against all 22 defendants
- Lindsey Manufacturing
 - Jury convicted, but Court vacated on prosecutorial misconduct grounds (DOJ has appealed)
- Daniel O’Shea
 - Court granted O’Shea’s motion for judgment of acquittal
 - “While the Government does not have to trace a particular dollar to a particular pocket of a particular official, it has to connect the payment to a particular official, that the funds made under his authority to a foreign official, who can be identified in some reasonable way, that is, with no reasonable doubt. . . .”

FCPA Trials (cont.)

- Jean Rene Duperval (former Haiti Telco official)
 - Money-laundering for *receipt* of the bribe
- Joel Esquenazi and Carlos Rodriguez
 - FCPA violations for offering the bribe
 - Esquenazi received 180-month sentence

Case study – Biomet Inc. (March 26, 2012)

- Deferred prosecution agreement with DOJ; \$17.28 million criminal penalty; \$5.4 million disgorgement; implement rigorous internal controls; independent compliance monitor for 18 months;
- Third medical device manufacturer to settle (Johnson & Johnson; Smith & Nephew Inc.)
 - “Biomet’s misconduct came to light because of the government’s proactive investigation of bribery within the medical device industry”
 - Kara Novaco Brockmeyer, Chief of the SEC’s Enforcement Division’s FCPA Unit
- “Biomet’s compliance and internal audit functions failed to stop the payments to doctors even after learning about the illegal practices.”

Biomet (cont.)

- “The Agreement recognizes
 - Biomet’s cooperation with the department’s investigation;
 - thorough and wide-reaching self-investigation of the underlying conduct;
 - and the remedial efforts and compliance improvements undertaken by the company.
 - In addition, Biomet received a reduction in its penalty as a result of its cooperation in the ongoing investigation of other companies and individuals.”
- Similar language in BizJet DPA

Definition of Foreign Official

- DOJ's consistent position on state-owned or controlled
 - Johnson & Johnson DPA – state-owned and national hospitals in Greece, Poland, and Romania
 - JGC Information – oil company 49% owned by Nigerian government
 - Alcatel-Lucent Information – state-owned telecoms in Costa Rica, Honduras, and Malaysia

Definition of Foreign Official (cont.)

- Two courts addressed the definition of “instrumentality” of a foreign government
 - Lindsey Manufacturing
 - Comisión Federal de Electricidad (“CFE”) – Mexican government-owned electrical utility
 - Carson
 - Government-owned oil and power companies in China, Korea, Malaysia, and the UAE
- Courts held it is a factual issue for the jury
 - Ownership by state not enough
 - Look to other factors, including function and purpose of entity, state control and finance of entity, perception of entity in country

Key SEC focus areas

- Going after newly-acquired foreign companies
 - Armor Holdings, Inc. (BAE Systems plc received NPA)
 - Ball Corporation
 - Diageo plc (SEC settlement for 3 acquired subsidiaries)
 - Watts Water Technologies (SEC settlement for Chinese subsidiary)
- Going after employees even after company settlements
 - Noble Corporation (Swiss oil services) – CEO, Division Manager in Nigeria, Controller/Director of Internal Audit
 - Siemens AG – 7 employees
 - Magyar Telekom and Deutsche Telekom – 3 individuals

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

Outside compliance monitors?

- Less than before
- Continue some use (Biomet)

International Cooperation

- Other countries have stepped up their enforcement efforts:
 - Canada, France, Germany, Greece, Nigeria, Switzerland, the United Kingdom
- DOJ/SEC recognized cooperation with the following countries' enforcement agencies:
 - France, Germany, Greece, Hungary, Italy, Macedonia, Switzerland, the United Kingdom

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

Compliance Tips

Compliance programs

- Company should develop FCPA policies, procedures and compliance program
- DOJ has provided guidance on what should be included in an anti-corruption compliance program
- Due diligence is a key to any anti-corruption compliance program

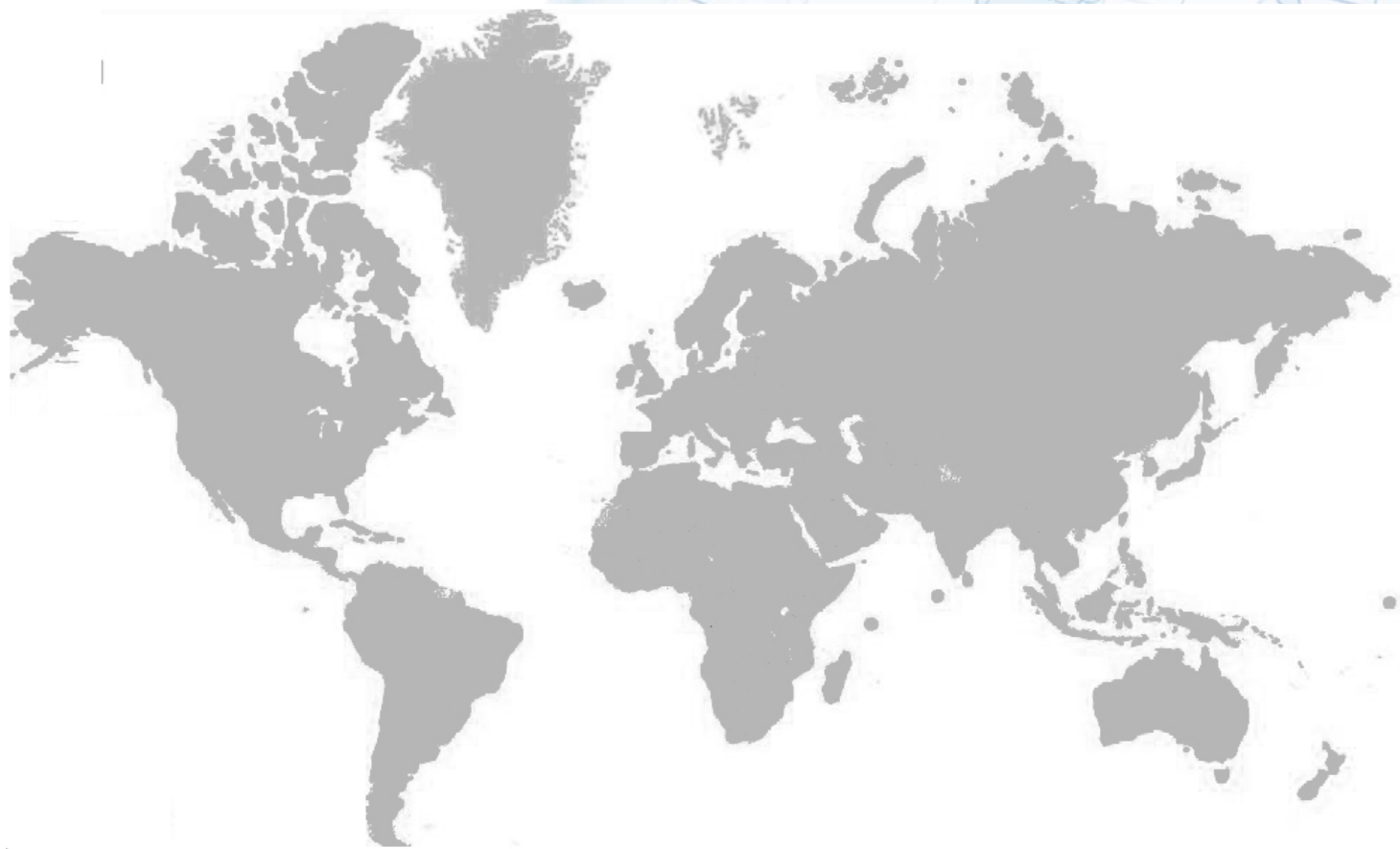
When should a company conduct due diligence?

- Hiring of agents
- Mergers and acquisitions
- Joint ventures and business partnerships
- Major investments

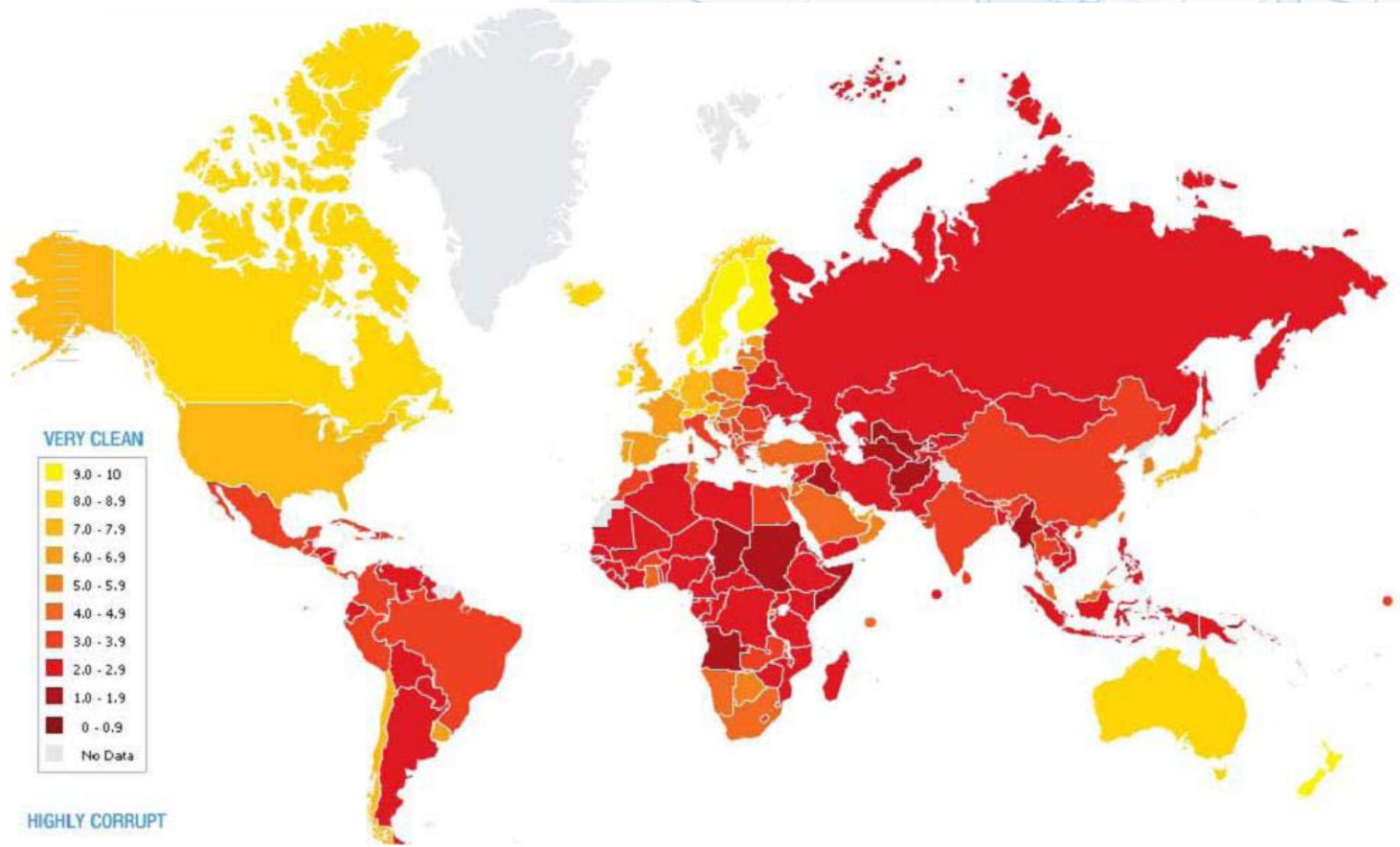
Due Diligence Considerations for Agents

- Territory's reputation for corruption
- Industry's reputation for corruption
- Agent's integrity, reputation, competence, and ability
- Agent's relationship with government officials
- Reasonableness and method of payment to Agent
- Compliance with local law
- Anticorruption safeguards in contractual agreements
- Continuing oversight of agent's activities

You see



Prosecutors see . . .



Questions and Answers

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