



# The Foreign Corrupt Practices Act: A Primer

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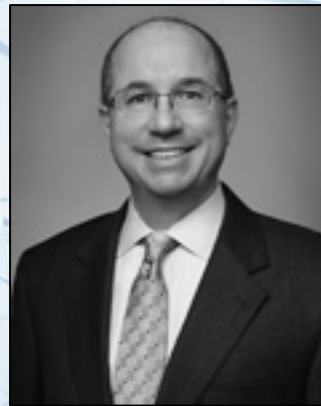


*A Broader Perspective*<sup>SM</sup>

# Today's Presenters



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# Topics of Discussion

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- Relevance
- Overview of the FCPA
- FCPA Compliance Programs
- Due Diligence
- The UK Bribery Act
- Questions and Answers

# Upcoming Webinars

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- The FCPA, the SEC and Dodd-Frank Whistleblower Provision
- Anti-Corruption 2011 Mid-year Enforcement Update – Analyzing the Trends in Global Enforcement
- Specific Issues in Anti-Corruption Investigations – When to Conduct, How to Conduct, Remediation and Possible Disclosure
- Anti-Corruption Investigations in Asia
- The U.K. Bribery Act – How to comply with the latest Anti-Corruption Law

# Relevance

- 9 of the 11 largest FCPA fines were in 2010:
  - BAE Systems plc – \$400 million to U.S.; €30 million to UK
  - Snamprogetti Netherlands B.V./ENI S.p.A. – \$365 million
  - Technip S.A. – \$338 million
  - Daimler AG (with two subsidiaries) – \$185 million
  - Alcatel-Lucent S.A. (with three subsidiaries) – \$137.4 million
  - Panalpina World Transport (Holding) Ltd. and Panalpina Inc. – \$81.8 million
  - ABB Ltd. (with two subsidiaries) – \$58.3 million
  - Pride International and Pride Forasol – \$56.1 million
  - SNEPCO – \$48.1 million
- More than \$1.6 billion total in fines in 2010
- And, already this year, two more fines that crack the top ten:
  - JGC agreed to pay \$218.8 million
  - Johnson & Johnson agreed to pay \$70 million (plus £4.8 million to UK)



# Overview of the FCPA

# History of the FCPA

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- SEC investigations in mid-1970s
  - 400+ US companies made questionable or illegal payments of more than \$300 million
  - Abuses ranged from bribery of high-level foreign officials to payments facilitating certain clerical duties (“facilitating payments”)
- 1977 – Congress enacted the FCPA

# 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 or securing any improper business advantage

# 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 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”

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- “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

# 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?

- The FCPA permits “facilitating payments”
  - 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 (for example, stamping passports)*
    - *Does not include decision by foreign official whether, or on what terms, to award new business to or to continue business with a particular party*
- **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*

# Request for DOJ Advisory Opinion

- Where a company is unsure whether an act would constitute an FCPA violation, the Act allows a company to submit an inquiry to DOJ concerning the propriety of the conduct
- DOJ must, within 30 days after receiving the inquiry, provide an advisory opinion to the requesting person or entity indicating whether the conduct complies with the FCPA
- Such requests provide helpful guidance, particularly because there is a dearth of decided cases interpreting FCPA provisions

# 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



# FCPA Compliance Programs

# Elements of an Acceptable FCPA Compliance Program

- Policy and written compliance code
- Commitment from the top
- Compliance standards and procedures covering gifts, travel and entertainment, political and charitable contributions, etc. . .
- Risk assessment
- Review and update of standards and procedures on an at least annual basis

## Elements (cont.)

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- Senior person responsible for oversight
- Internal controls for accurate books and records
- Communication to employees of policies, standards and procedures
- Effective system to provide advice on an urgent basis
- Appropriate disciplinary procedures for violations
- Appropriate due diligence for retention of agents and business partners



## Elements (cont.)

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- Standard anticorruption provisions in agreements and contracts
- Regular audit of compliance code, standards and procedures



# Due Diligence

# When should a company conduct due diligence?

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

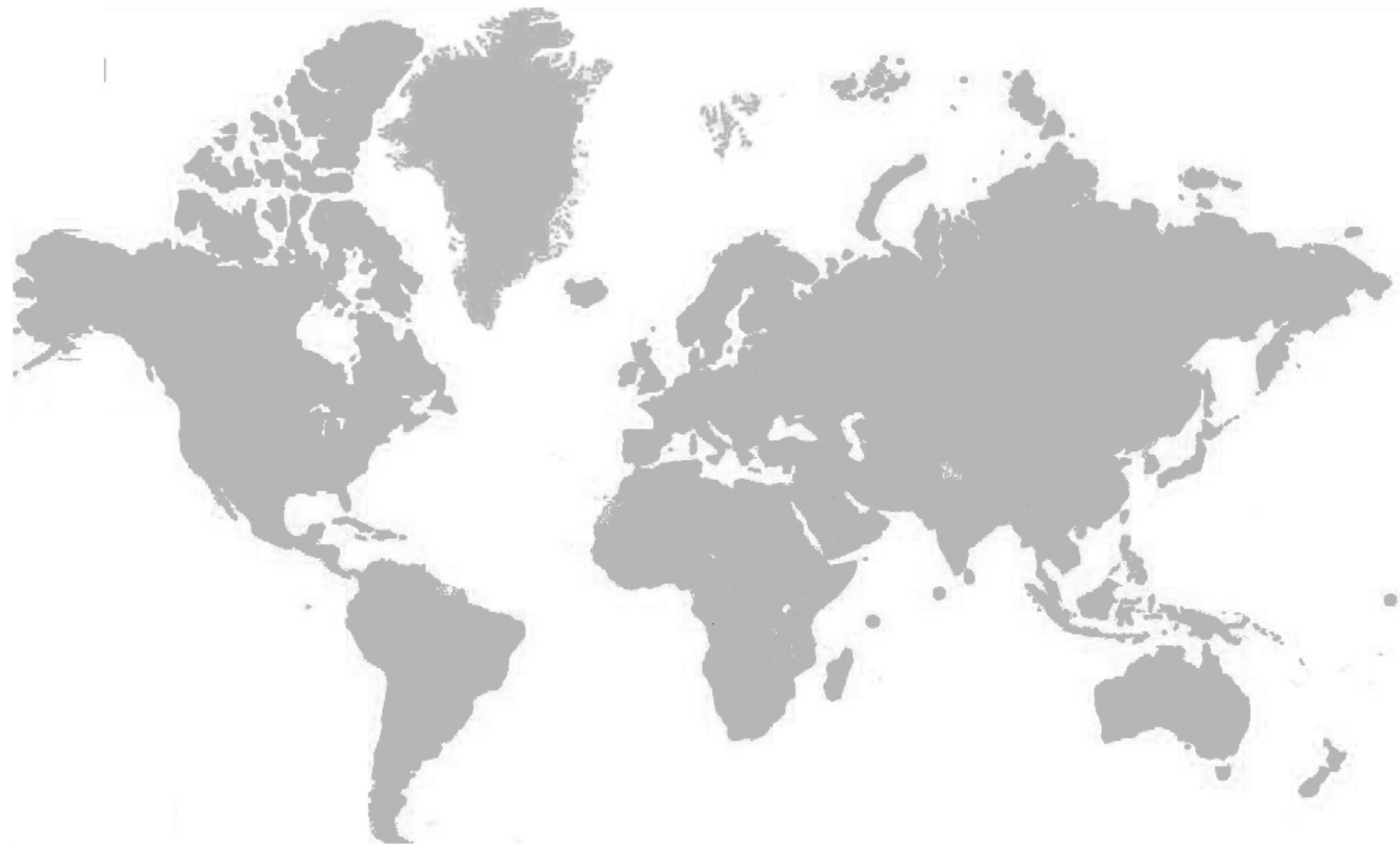
# Due Diligence Considerations for Agents

- 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

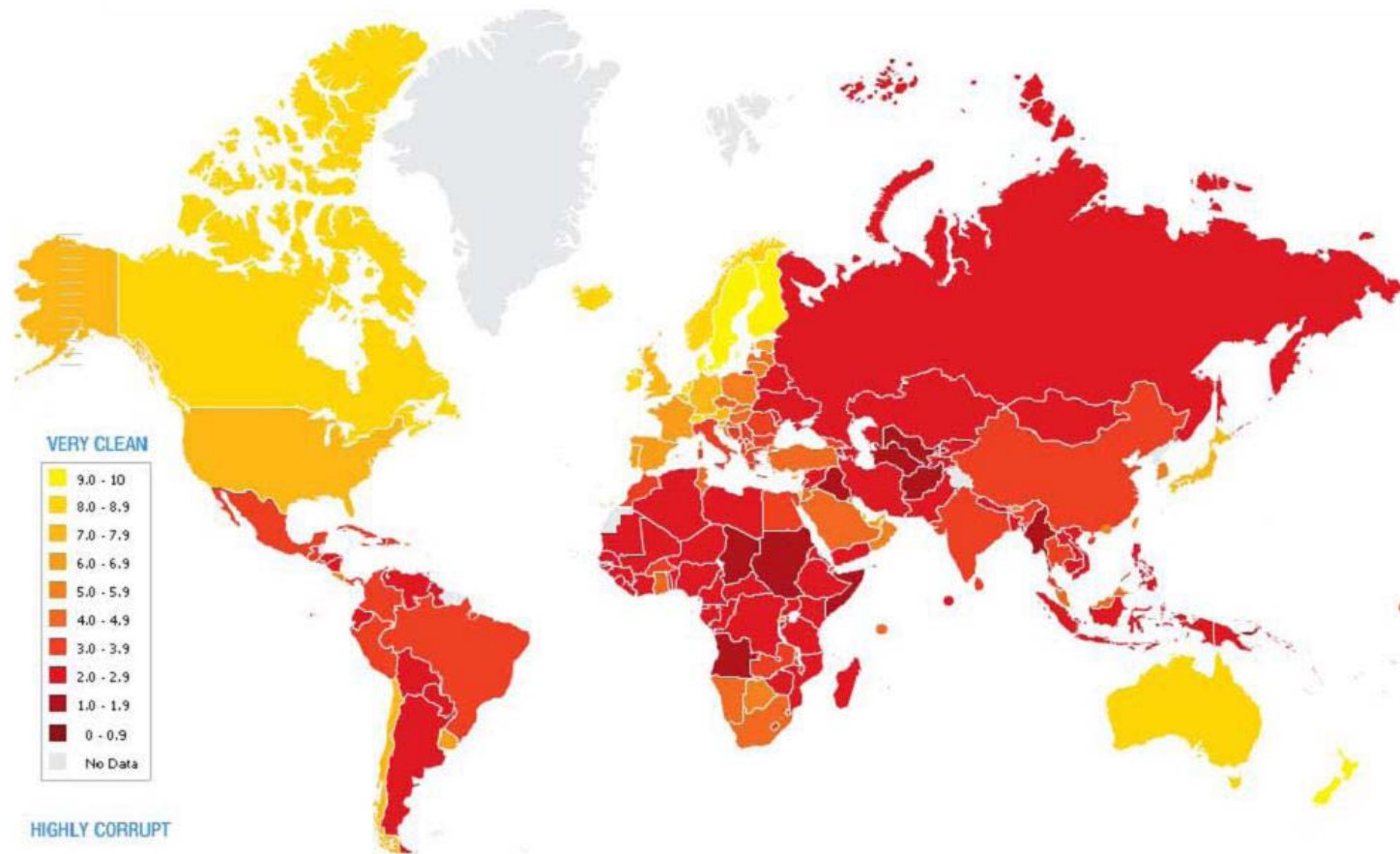


# You see

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# Prosecutors see . . .



# Due Diligence Considerations for Acquisitions

- Know your target
  - Owners, key employees, senior executives
  - Reputational due diligence and OFAC/AML checks
- Understand how company identified target
- Identify potential interactions with foreign officials
- Identify agents, consultants, representatives, distributors and customers
- Evaluate financial records and internal controls
- Review anticorruption policies, procedures, certifications, training and audits
- Review litigation/regulatory issues



# The UK Bribery Act 2010



# Overview of the 2010 UK Bribery Act

- Comes into force 1 July 2011
- Will affect UK subsidiaries of U.S. companies
- Will affect U.S. companies and their non-UK affiliates that do business in the UK
- Possibility of multiple enforcement actions
- International enforcement on the increase

# Overview of the 2010 UK Bribery Act

- Two “general” offences: bribery and taking a bribe
  - Offer, promise or gift of a financial or other advantage directly or through a 3<sup>rd</sup> party
  - Intending to induce or reward, or with knowledge that acceptance would constitute, “improper performance” of a public function, or a private function relating to business, employment, activities of a company

## Overview of the 2010 UK Bribery Act

- Separate offense of bribery of a foreign official (in addition to general bribery provision)
  - Direct or indirect offer, promise or gift of financial or other advantage to a foreign official or at his/her request or assent
  - Intent to influence the official in his/her official capacity to obtain or retain business or business advantage

# Overview of the 2010 UK Bribery Act

- Separate offense of bribery of a foreign official
  - No improper performance or corruption element – only intent to influence to obtain or retain business or business advantage
    - Hospitality issues for foreign officials?
    - Some comfort in Ministry of Justice guidance concerning reasonable and proportionate hospitality – ultimately for the courts



## Comparison to FCPA

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- Extends to “private to private” bribery
  - e.g. payment to an employee in procurement department to favor bid
- No carve-out for facilitation payments
  - dependent on prosecutorial discretion
- No “corrupt intent” element in bribery of foreign officials

## Failure to Prevent Bribery Offence

- Strict liability offence if a “relevant commercial organisation” fails to prevent bribery by an “associated” person intending to obtain/retain business or a business advantage for the commercial organisation
- Relevant commercial organisations
  - UK companies
  - Non-UK companies “doing business” in the UK

## Failure to Prevent Bribery Offence

- Associated person – a person anywhere who performs services anywhere for or on behalf of a relevant commercial organisation
  - No requirement for the associated person to have a close connection with the UK
  - No requirement for the bribe to relate to the UK business of a non-UK company
- U.S. company with any business in the UK making facilitation payments in Indonesia

# Adequate Procedures

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- Statutory defence if the commercial organisation can prove it had in place “adequate procedures” designed to prevent associated persons from undertaking such conduct
- Ministry of Justice Guidance – No hard and fast rules; ultimately for the courts to decide

# Adequate Procedures 6 Principles

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- Proportionate to the bribery risks faced by and size and complexity of the business
- Top Level Commitment
- Risk Assessment
- Due Diligence
- Communication and Training
- Monitoring and Review

# Adequate Procedures

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- Are FCPA compliance procedures enough?
  - Private bribery
  - Accepting a bribe
  - Facilitation payments
- Common core of good practice arising out of years of experience under the FCPA
- Abundant literature and commentary

## Enforcement Issues

- Conviction on indictment risks unlimited fines (subject to prosecutorial guidelines) and up to 10 years imprisonment
- No discretion on imposition of public procurement ban
- Current uncertainties in UK re plea bargaining
- No formal advisory opinion program
- Anti-money laundering laws overlap

# London Seminar

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- International Enforcement Heats Up: The New UK Bribery Act and the US Foreign Corrupt Practices Act
  - *are you ready?*
- June 9, 2011
- Speakers include:
  - Keith McCarthy, Chief Investigator, Serious Fraud Office
  - Bill Waite, CEO, The Risk Advisory Group Plc
  - Anita, Paul and Mark



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# Questions and Answers

# Contact Information

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