



**The Foreign Corrupt
Practices Act:
Exploring the New Guidance Manual
and How it Affects
Your Company's Compliance Program**

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A Broader PerspectiveSM

Presenters



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Agenda

- Exploring the New Guidance Manual
 - Background
 - Anti-bribery Provisions
 - Books and Records Provisions
 - Guiding Principles of Enforcement
- How to Apply the Guidance to Your Company's Compliance Program

The FCPA Guidance Manual

- Released after over a year
- Not a light read
 - 120 pages
 - 418 footnotes
- Meant to be a resource
- Not meant to limit government enforcement efforts
- Does not modify the existing program
- Contains many hypotheticals – none of which could be called close calls

FCPA Enforcement is here to stay

- “Corporate bribery is bad business” and “Corruption is also bad for business”
 - Guidance Manual
- “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

Coordinated efforts

- Not just the DOJ and the SEC
- FBI
- Department of Commerce
- Department of State
- International partners
 - OECD Working Group
 - UN Convention Against Corruption



Anti-bribery Provisions

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

Jurisdiction – Issuers

- If the company is listed on a national securities exchange in the United States (either stock or ADR)
- If the company's stock trades in the OTC market in the United States and is required to file SEC reports
- But also:
- “Officers, directors, employees, agents or stockholders acting on behalf of an issuer (whether U.S. or foreign nationals)”
- “any co-conspirators”

Jurisdiction – Domestic Concerns

- U.S. citizens, nationals, and residents
- Any entity (corporation, partnership, etc.) that is organized under or has its principal place of business in the U.S. or a U.S. territory.
- Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies

Jurisdiction – Territorial

- 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
- The Guidance emphasizes the word “any”
- “Also, officers, directors, employees, agents, or stockholders acting on behalf of such persons or entities *may be* subject to the FCPA’s anti-bribery prohibitions.” (Emphasis added)

Warnings to foreign companies and individuals

- “Thus, for example, a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting.”
- “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.”

The Business Purpose Test

- Statutory test: “in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.”
- Guidance interpretation: the FCPA “does apply broadly to bribes paid to help obtain or retain business, which can include payments made to secure a wide variety of unfair business advantages.”
- Includes:
 - Circumventing the procurement process
 - Gaining access to non-public bid tender information
 - Evading taxes or penalties
 - Influencing the adjudication of lawsuits or enforcement actions
 - Obtaining exceptions to regulations
 - Avoiding contract termination

Meaning of “Corruptly”

- “Corruptly” means an intent or desire to wrongfully influence the recipient
- Corrupt intent is required; success is not
- As long as the offer, promise, authorization, or payment is made corruptly, the actor need not know the identity of the recipient; the attempt is sufficient
- “Thus, an executive who authorizes others to pay ‘whoever you need to’ in a foreign government to obtain a contract has violated the FCPA – even if no bribe is ultimately offered or paid.”

What does “willfully” mean?

- Not defined in the FCPA
- General case law – an act committed voluntarily and purposefully, and with a bad purpose
 - With “knowledge that [a defendant] was doing a ‘bad’ act under the general rules of law”
 - The government does not have to prove that a defendant was specifically aware of the FCPA or knew that his conduct violated the FCPA
- Proof of willfulness is not required to establish corporate criminal or civil liability, though proof of corrupt intent is
 - Statutory language

Payments to Third Parties

- The Manual reminds companies that they can be liable under the FCPA for knowing of corrupt payments made by agents or intermediaries
- “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
- Unwarranted obliviousness/willful blindness will not protect management
 - Government will look at red flags, including excessive commissions to agents, vague “consulting agreements,” and relationships between the agent and government officials

What Qualifies as “Anything of Value”

- Comes in all shapes and sizes - any unfair benefit
- Payor must still have corrupt intent
- Cash or the equivalent of cash such as a gift card, voucher, coupon
 - Items of nominal value, such as cab fare, reasonable meals and entertainment expenses, or company promotional items are unlikely to improperly influence an official
- Gifts
 - The FCPA does not prohibit gift-giving – the FCPA prohibits the payments of bribes, including those disguised as gifts
 - Large and extravagant gifts (sports cars, fur coats, other luxury items)
 - Gifts that are more than a mere token or modest in value that are tokens of esteem or gratitude if given openly and properly recorded in the books and records do not violate FCPA, unless widespread and part of a pattern of bribes

Entertainment or travel

- Both DOJ and SEC have brought cases where travel and entertainment expenditures occurred in conjunction with other conduct reflecting systematic bribery or other clear indicia or corrupt intent
- Examples:
 - \$12K birthday trip that included visits to wineries and dinners
 - \$10K spent on dinner, drinks and entertainment
 - Trip to Italy – primarily sightseeing and \$1K “pocket money” for each official
 - Trip to Paris for official and his wife – primarily touring activities via chauffeur-driven vehicle
- Payments to third parties (like official’s family) also violate the FCPA

Gift giving hypothetical

- Company A has booth at trade show and offers free pens, hats, t-shirts, and other logo-items and serves coffee and other beverages and snacks
- Invites a dozen current and prospective customers out for drinks and pays moderate bar tab
- Wins contract and executives give general manager of agency who was recently married a moderately priced crystal vase as wedding gift
- Pays for business class airfare, hotel and for inspection of facilities and pay for moderately priced dinner, baseball game and a play
- Travel first class with their spouses for all-expenses-paid, week-long trip to Las Vegas, where there are no company facilities
- Contract on rebid and official offers to give inside information in exchange for vacation to Paris with his girlfriend

Charitable contributions

- FCPA does not prohibit charitable contributions or prevent corporations from acting as good corporate citizens
- Can be problematic if to induce a foreign official to direct business to the company
 - Made contributions to legitimate charitable organization headed by government official
 - Company treated donations as “dues” required to be paid for official’s assistance

Who Is a “Foreign Official”?

- No comfort that the DOJ and SEC will interpret more narrowly
- FCPA prohibits corrupt payments to:
 - Any foreign official
 - Any foreign political party or official thereof
 - Any candidate for foreign political office
 - Any person, if you know that he/she will pass a corrupt payment to one of the above
- Guidance emphasizes that the language is broad and “any” prohibits bribes to low-ranking employees and high-level officials alike

Instrumentalities

- “Foreign official” includes officers and employees of instrumentalities of foreign governments
- Many foreign government operate through state-owned and state-controlled entities
 - Particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation
- “Instrumentality” includes an entity where a foreign government owns or controls a majority of shares
 - Instrumentality is not likely to include entities where the government has a minority interest, unless it has substantial control

Instrumentalities (cont.)

- Fact-specific analysis of an entity's ownership, control, status, and function
- DOJ and SEC have done this since the beginning of time (at least the beginning of enforcement of the FCPA)
 - Mexican national oil company
 - Mexican-owned and controlled electricity commission
 - Haiti-owned and controlled telecommunications company
 - Malaysian telecommunications company (Gov't owned only 43% of shares, but Ministry had veto power over all major expenditures, controlled important operational decisions, appointed senior officers)

Affirmative Defenses

- “Lawful” under local law
 - The Manual concedes that written laws of other countries do not usually permit corrupt payments
 - The fact that bribes may not be prosecuted under local law does not suffice for this defense
 - In *US v. Kozeny*, court ruled that an exception under Azeri law relieving bribe payors who voluntarily disclose bribe payments to the authorities of criminal liability did not make the bribes legal under this affirmative defense

“Reasonable and bona fide” expenditures

- Companies may pay reasonable expenditures for the promotion, demonstration, or explanation of a company’s products or services, or related to the execution or performance of a contract
- Fact-specific analysis is necessary
- Ensure expenditures are:
 - reasonable
 - bona fide
 - directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract

Facilitating Payments Exception

- Applies ONLY to expedite or secure performance of “routine governmental action” by a government official.
 - Must be non-discretionary, and not a misuse of discretion
 - Size is not determinative, but can suggest discretion or corruption – look to purpose rather than its value
- 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
- **AND** facilitating payments are not always permitted under local foreign law

Extortion or duress

- Payments made under extortion or duress will not give rise to FCPA liability
 - true extortionate demands under imminent threat of physical harm
 - “a payment to an official to keep an oil rig from being dynamited should not be held to be made with the requisite corrupt intent”
- Mere *economic* coercion does not amount to extortion
- If true extortion happens, company should contact appropriate U.S. embassy

Parent-subsubsidiary liability

- Parent may have participated sufficiently to be directly liable for the conduct
 - e.g. directed misconduct or participated in bribe scheme
- Parent may be liable under traditional agency principles
 - Evaluate parent's control, including the parent's knowledge and direction of the subsidiary's actions, both *generally* and in the context of the specific transaction
 - If an agency relationship exists, a subsidiary's actions and knowledge are imputed to its parent
 - Under *respondeat superior*, the parent is liable for actions of the subsidiary's employees done in the course of employment and at least in part for the benefit of the company

Successor Liability

- “Applies to all kinds of civil and criminal liabilities, including FCPA”
- Does not create liability where there was none before
- Manual suggests that the DOJ and SEC only take action against successor companies in “limited circumstances:”
 - Egregious or sustained violations
 - The acquiring company participated in the violation or failed to stop the misconduct
- The Manual advises voluntary disclosure, appropriate due diligence, and implementation of an effective compliance program to decrease the likelihood of an enforcement action

Aiding and Abetting and Conspiracy

- Even if the foreign entity or individual is not covered under FCPA jurisdiction, DOJ and SEC take the position that they can be convicted of conspiring to violate the FCPA
- DOJ and SEC take the position that even if the foreign entity or individual did not take an act within the U.S. in furtherance of the violation, it can be convicted of aiding and abetting an FCPA violation
- Asserts civil liability for aiding and abetting if they knowingly or recklessly provided substantial assistance to the violator



Books and Records Provisions

Books and Records

- Books, records, and accounts must be kept “in reasonable detail”
 - Level of detail that would satisfy prudent officials in the conduct of their own affairs
 - No materiality threshold
 - Bribes are often concealed as legitimate payments, such as consulting fees, marketing expenses, travel and entertainment, or discounts
- System of internal accounting controls
 - The processes in place to ensure accurate financial reporting
 - Includes the organization’s “tone,” risk assessments, and control activities such as approvals, authorizations, segregation of duties, etc.
 - An effective compliance program is a critical component of internal controls
- SEC will look to see if there are potential reporting and anti-fraud violations that accompany the FCPA violation
- There can be criminal liability for accounting violations

Who is covered by these provisions?

- Applies to issuers with securities registered pursuant to the Exchange Act
- Parent companies may be liable for false or fraudulent entries on any book or record of a subsidiary whose results are consolidated into its financial statements
- 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

Other related U.S. laws

- Travel Act
- Money Laundering
- Mail and Wire Fraud
- Certification and Reporting Violations
- Tax Violations

Guiding Principles of Enforcement

- DOJ Principles of Federal Prosecution
- DOJ Principles of Federal Prosecution of Business Organizations
- SEC's Enforcement Manual

Enforcement principles (cont.)

- Self-reporting, cooperation, and remedial efforts
 - Both DOJ and SEC place a “high premium” on these
 - voluntary and timely disclosure
 - willingness to provide relevant information and evidence and identify relevant actors including senior executives
 - remedial actions including improving compliance programs and disciplining or wrongdoers
- Corporate compliance program
 - Is the company’s compliance program well designed?
 - Is it being applied in good faith?
 - Does it work?

The stick – penalties

- Prison
- Criminal fines – a whole bunch
- Civil penalties
- Collateral consequences
 - Debarment
 - Loss of export privileges
- Appointment of compliance monitor or independent consultant



Guidance Manual's Compliance Pointers

Compliance Programs

- One size does not fit all
- Requires a careful analysis of your business and an identification of your risks
- 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 FCPA compliance program

Specific policies and procedures

- Once the risk assessment is done, the company needs to institute specific policies and procedures
- For gift giving, clear and easily accessible guidelines and processes in place for gift-giving by the company's directors, officers, employees, and agents
 - Many larger companies have automated gift-giving clearance processes and have set clear monetary thresholds for gifts along with annual limitations, with limited exceptions for gifts approved by appropriate management

Charitable giving compliance

- Proper due diligence and controls are critical for charitable giving
- Five questions to consider:
 - What is the purpose of the payment?
 - Is the payment consistent with the company's internal guidelines on charitable giving?
 - Is the payment at the request of a foreign official?
 - Is a foreign official associated with the charity and, if so, can the foreign official make decisions regarding your business in that country?
 - Is the payment conditioned upon receiving business or other benefits?

Reasonable and Bona Fide Expenditures

- The Manual lists “safeguards” to evaluate expenditures, such as:
 - Do not select particular officials or merit-based selection
 - Pay costs directly to travel and lodging vendors
 - Do not advance funds or pay for reimbursement in cash
 - Ensure that stipends approximate anticipated costs
 - Ensure that expenditures are transparent, both within the company and the foreign government
 - Do not condition payment of expenses on action by the official
 - Obtain written confirmation that it does not violate local law
 - Provide no additional compensation, stipends, or spending money beyond what is necessary to pay for actual expenses
 - Properly document expenditures in books and records

When should a company conduct due diligence?

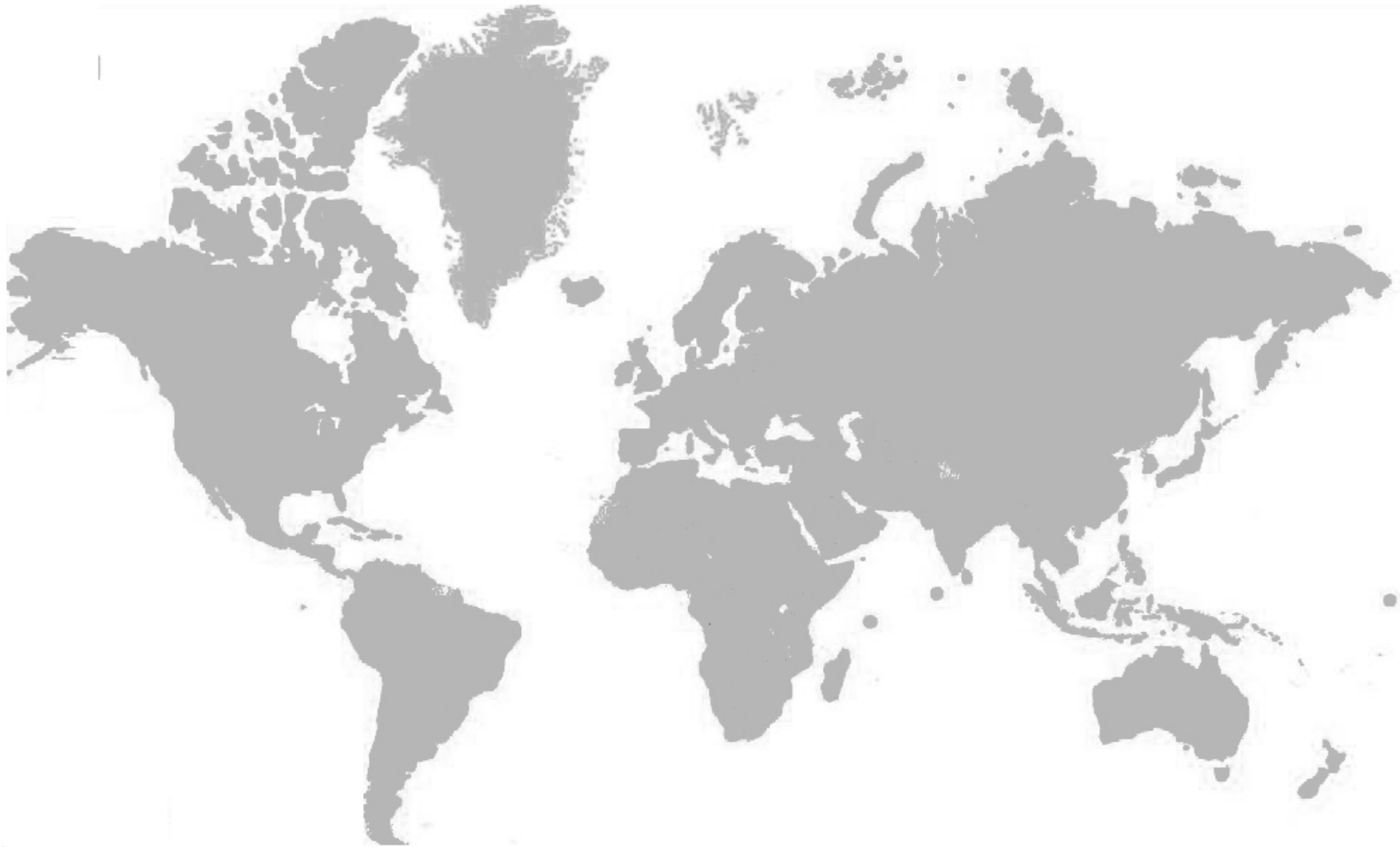
- Due diligence is the key to any anti-corruption compliance program
- It is a must for:
 - New and existing agents, third-party relationships, distributors
 - Joint ventures and business partnerships
 - Major investments
 - Mergers and acquisitions

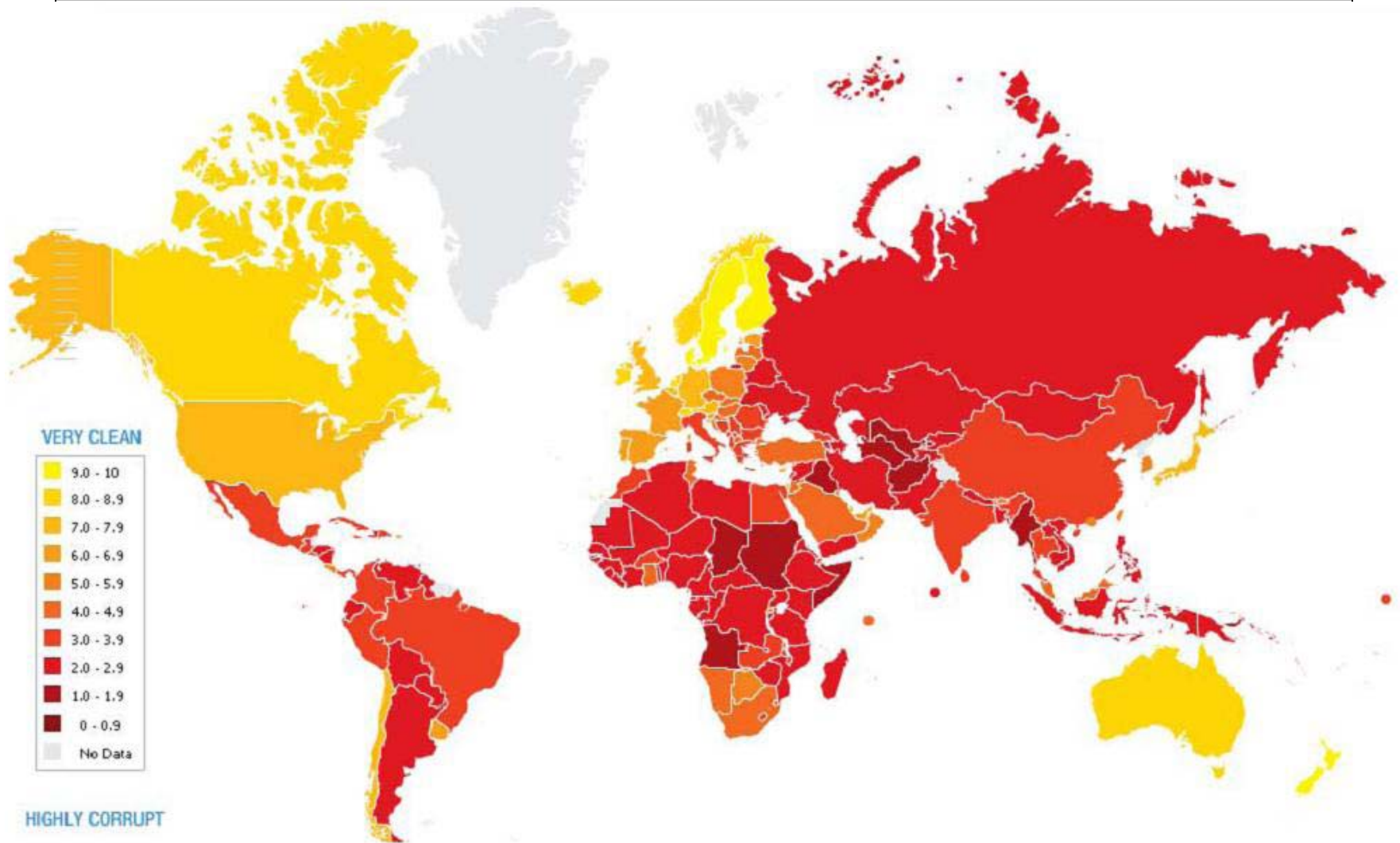
Key considerations for due diligence on agents and third parties

- Determine the qualifications and associations of the agent/third party
 - Especially relationships with foreign officials
- Understand the business rationale for retaining the agent/third party
 - Review how the agent was chosen
 - Review compensation
- Continuously monitor/audit the agent/third party relationship

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







Questions and Answers

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