

Foreign Corrupt Practices Act Update and Recent Trends

International Services & Business Abroad
Group

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Curriculum Overview

- Description of the Law
 - Anti-Bribery Provisions
 - Accounting Provisions
 - International Enforcement/New UK Bribery Act
- Key Issues and Trends



FCPA

Anti-bribery Provisions

The FCPA – An Overview

– Syriana Trailer

- FCPA has two provisions: (i) Anti-bribery Provisions; and (ii) Accounting Provisions
 - Anti-bribery Provisions
 - Section 30A of the Exchange Act – Applies to Issuers (publicly traded companies) and their officers, directors, employees and agents
 - 78dd-2 – Applies to “Domestic Concerns” (US private companies and US persons) and their officers, directors, employees and agents
 - 78dd-3 – Applies to All Other Persons (generally non-US persons and entities) and their officers, directors, employees and agents provided they take an act in furtherance of a bribe in the US
 - Accounting Provisions - Sections 13(b)(2)(A) and (B) – Applies Only to Issuers, and indirectly to their subsidiaries

FCPA's Anti-bribery Provisions

- The FCPA's anti-bribery provisions prohibit:
 - Payment/offer/promise/authorization to pay
 - Money or anything of value
 - Corruptly
 - To official(s)/representative(s) of a foreign government or government instrumentality or public international organization, foreign political party, foreign party official, candidate for foreign political office, foreign political party (includes employees at SOEs)
 - Directly
 - Indirectly through a third party “knowing” that some or all of the payment will be paid to a foreign official
 - To Obtain or Retain business or some improper benefit or to direct business to another

FCPA Anti-bribery Provisions

- “Facilitation payments” are not prohibited by the FCPA
 - Payments to government officials for non-discretionary acts
 - Narrowly construed
 - Must be accurately recorded
- Two Affirmative Defenses
 - Reasonable and bona fide expenses incurred in connection with product/service demonstration
 - Payment is lawful under written local law

Anti-bribery Provisions - The Problem of Knowledge

Actual or Constructive

- Constructive:
 - Awareness of high probability of improper payment occurring based on circumstances, particularly the existence of “red flags” that are not resolved
 - Addresses willful blindness, conscious disregard, “head in the sand”
- How to Address?

Anti-bribery Provisions - Instrumentalities

- FCPA does not define a government instrumentality for purposes of determining who is a government official
- Presumption is that it is entity “controlled” by a government body, but not clear definition of control
 - Accordingly, presumption is that employees of State-owned or controlled commercial enterprises are government officials
 - SEC and DOJ FCPA enforcement actions involving payments to representatives of state-owned enterprises
- Need for caution: (i) golden share; (ii) “springing” control rights; and (iii) form over substance

The Enforcers



Assistant Attorney General Lanny A. Breuer Comments – November 16, 2010

- “I am aware that, for some of you, as we have become more aggressive, you have become more worried...On one hand, I want to tell you this afternoon that you are right to be more concerned. As our track record over the last year makes clear, we are in a new era of FCPA enforcement; and we are here to stay.”
- “[L]et me be perfectly clear ... FCPA enforcement is not bad for business; it is, instead, vital to ensuring the integrity of our markets. Our FCPA enforcement program serves not only to hold accountable those who corrupt foreign officials, but in doing so it also serves to make the international business climate more transparent and fair for everyone. FCPA enforcement both roots out foreign corruption and deters it from taking hold in the first place.”
- “Another unfounded criticism...is that FCPA enforcement puts American businesses at a competitive disadvantage vis-à-vis their foreign counterparts. I could not disagree more. First, we do not only prosecute U.S. companies and individuals under the FCPA. Indeed, over the last five years, more than half of our corporate FCPA resolutions have involved foreign companies or U.S. subsidiaries of foreign companies.”

Enforcement

- Both the Department of Justice (“DOJ”) and the Securities and Exchange Commission (“SEC”) have enforcement authority for FCPA violations
- SEC: Has enforcement authority with respect to violations of the FCPA anti-bribery and accounting provisions by issuers and their officers, directors, employees and agents
 - Arises out of SEC’s status as primary regulator of public companies
 - DOJ also has concurrent criminal enforcement authority over issuers
- DOJ has criminal enforcement authority over violations of the FCPA’s anti-bribery provisions by “Domestic Concerns” and “Other Persons”
- DOJ and SEC routinely work closely in parallel investigations

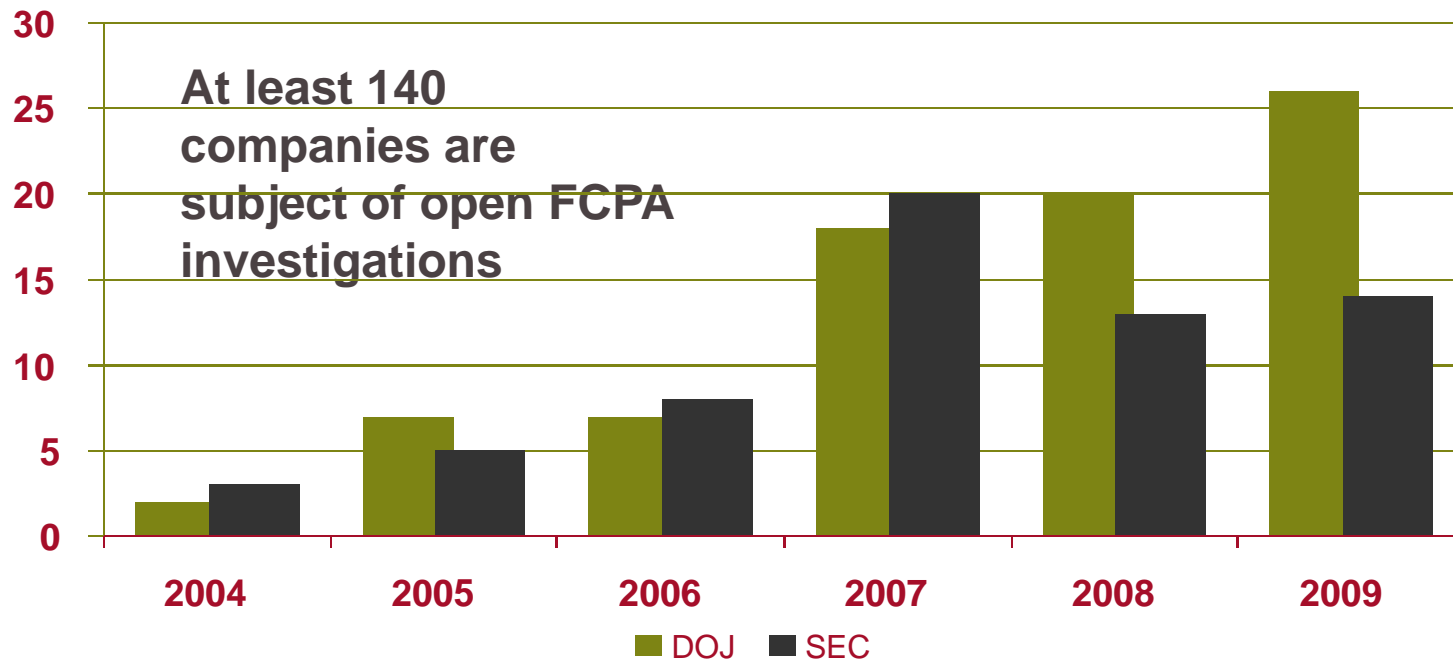
Investigation Process

- SEC
 - Informal inquiry – Matter Under Investigation
 - Formal Investigation
 - Formal Order of Investigation. Provides the SEC with administrative subpoena authority
 - Document production, investigative testimony
 - SEC Rules of Practice govern investigations
 - Federal Rules of Civil Procedure and Evidence, in theory, applicable in investigation stage
 - SEC does not have authority to conduct covert investigations.
 - No wired witnesses
 - Proffers, cooperation credit, DPAs, NPAs
 - SEC Manual
 - Can request DOJ to provide immunity
 - Decision to file an enforcement action
 - Federal District Court
 - Administrative Proceeding
 - Action Memorandum
 - Approval
- DOJ
 - Voluntary production
 - No grand jury convened
 - No grand jury subpoenas
 - Grand Jury
 - Documents and testimony taken pursuant to subpoena
 - Document production, investigative testimony
 - Federal Rules of Criminal Procedure govern investigation
 - Undercover witness, including wired witnesses
 - Proffers, cooperation credit, DPAs, NPAs
 - U.S. Attorney's Manual (including Filip memorandum)
 - Can provide immunity
 - Decision to prosecute
 - Federal District Court
 - Prosecution Memo
 - Approval

Why Does the SEC Care About Foreign Corruption?

- Corruption and the related practices affect an issuer’s financial statements, investor representations, books and records and internal controls processes
 - The SEC’s FCPA jurisdiction is a vestige of the 1970s investigations and the targets of those investigations – large publicly traded companies that bribed foreign officials
 - These companies misrecorded these bribes on their books, some of which may have been “material,” made misrepresentations to investors about their activities and completely circumvented corporate controls in order to create funds/pools to make those payments
 - This conduct and misrepresentations went to the heart of the material investors relied upon in making their investment decisions and the integrity of public company management
 - The investigations of questionable foreign payments originally focused on whether these companies made any material misrepresentations in their SEC filings/periodic reports with respect to these payments
 - Legislative history suggests that Congress provided the SEC with jurisdiction because it is an independent agency (not a part of the Executive Branch like the DOJ), it has “immediate access” to the company’s books and records, and the SEC beat the DOJ to the punch in investigating the foreign bribery cases (early 1975 v. late 2006). See Conf Rept. H. Rept. 95-640.

US FCPA Actions



Notable Cases

- Siemens – “Systemic“ corruption and lack of internal controls
- Snamprogetti Netherlands B.V. / ENI S.p.A. – FCPA violations arising out of joint venture-related activity in Africa
 - Non-US entities, ENI S.p.A. is a foreign private issuer
- Panalpina – Swiss-based freight forwarding and logistics company
 - Not listed in the US
 - Had US operations and a US subsidiary
- Veraz Networks – FCPA violations by a company that had recently gone public
- Tyco – Red flags discovered during due diligence into foreign targets can serve as basis for “knowledge”

Increasing Fines and Penalties

- Siemens \$800 million in 2008
- KBR / Halliburton \$579 million in 2009
- BAE \$400 million in 2010
- Snamprogetti Netherlands B.V. / ENI S.p.A. \$365 million in 2010
- Technip S.A. \$338 million in 2010
- Daimler AG \$185 million in 2010
- Panalpina \$81.8 million in 2010
- ABB Ltd \$58.3 million in 2010
- Pride \$56.1 million in 2010
- Shell \$48.1 million in 2010



Accounting Provisions

Accounting Provisions

- Books and Records: Issuers must make and keep books, records, and accounts in sufficient detail to accurately and fairly reflect the issuer's transactions and dispositions of assets
- Internal Accounting Controls: Issuers must maintain a system of internal accounting controls sufficient to provide reasonable assurances that:
 - Transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP and to maintain accountability for assets
 - Transactions and access to Company assets are permitted only in accordance with management's authorization
 - Assets are accounted for and discrepancies investigated

Accounting Provisions

- Application of Accounting Provisions to Subsidiaries
 - Majority ownership of domestic/foreign subsidiary: Issuer must use its influence to ensure that the subsidiary maintains adequate internal accounting controls and accurate books and records
 - Less than majority ownership: Issuer required to exercise good faith
- Violations do not require bribery-related conduct
- No state of mind or materiality requirements for the accounting provisions
- Reasonableness is the standard



International Legal Regime and Enforcement

International Anti-corruption Enforcement

- OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions (1997)
- “The OECD Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective.”
 - “It is the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction.”
- Countries: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States

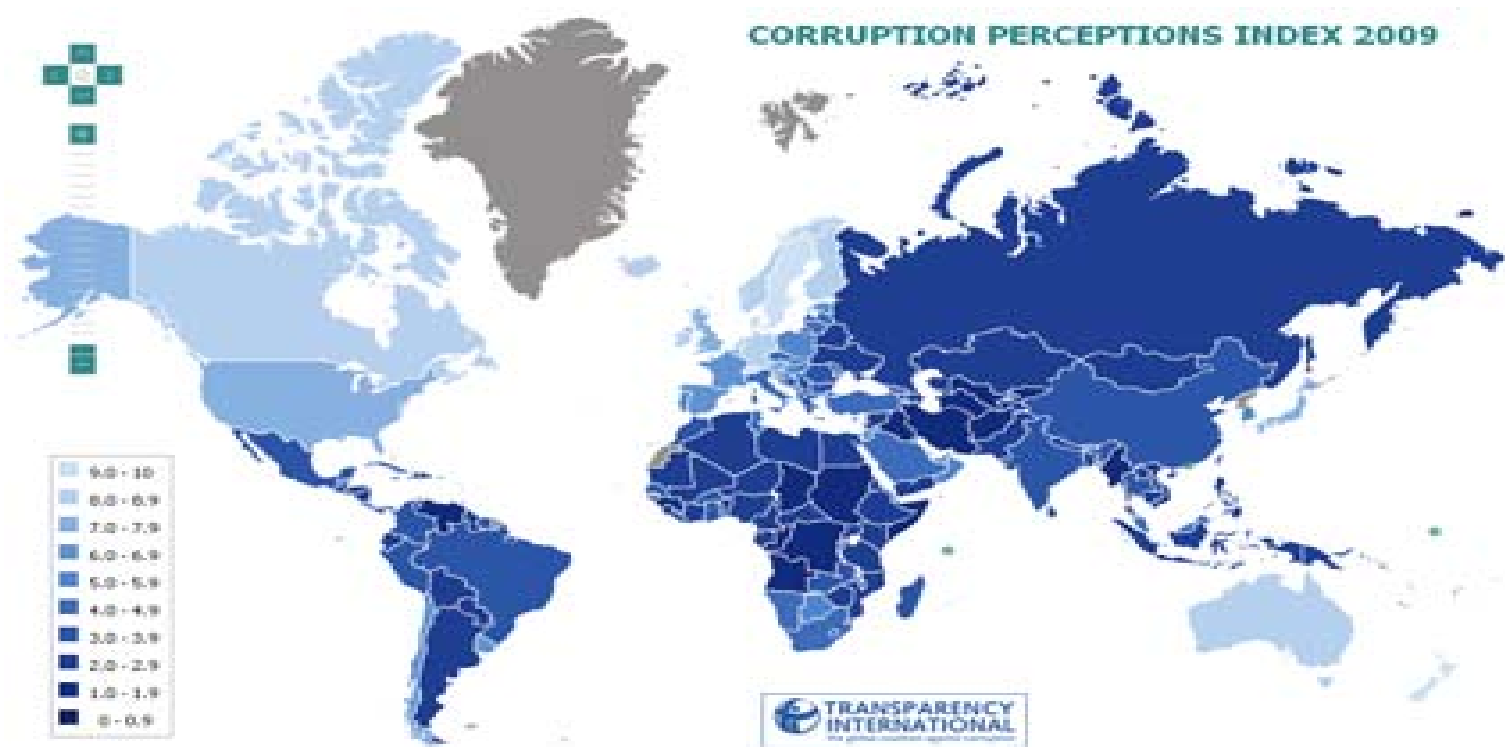
UK Bribery Act 2010

- UK Bribery Act of 2010 – The FCPA on Steroids
 - “replace the fragmented and complex offences at common law and in the Prevention of Corruption Acts 1889-1916”
 - “create two general offences covering the offering, promising or giving of an advantage, and requesting, agreeing to receive or accepting of an advantage”
 - “create a discrete offence of bribery of a foreign public official”
 - “create a new offence of failure by a commercial organisation to prevent a bribe being paid for or on its behalf (it will be a defence if the organisation has adequate procedures in place to prevent bribery)”
 - “require the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent bribery on their behalf “



Key Issues and Trends

Where is the Risk?



What is the Risk?

- Key Relationships In Sales Chain
 - Government-Owned or Controlled Customers
 - Wholesalers, Distributors, Resellers, Dealers, Agents
 - Strategic Partners
 - Jurisdiction-Specific
- Interactions With Government Officials
 - Permits, Licenses, Approvals, Authorizations
- Soft Issues
 - Gifts, Entertainment, Hospitality, Training, Discounts, etc.
- Merger & Acquisition/Joint Venture/Consortium Partners

How Do You Control The Risks?

- Maintain a compliance program, including policies and procedures addressing anti-corruption law risk
 - Anti-bribery, gift, entertainment, hospitality, charitable and political contributions, disbursement controls
 - Provides practical protection
 - Will assist in obtaining credit in an investigation/prosecution
- Conduct due diligence on and monitor all parties in sales chain
 - Focus on higher risk relationships
- Risk of Successor Liability: Conduct reasonably tailored screening/due diligence on M&A targets, business partners and other third parties

Special Issues Under the FCPA

- Prosecution of Individuals
- Facilitation Payments
- Hospitalities, Gifts and Entertainment
- Distributors/Intermediaries
- Accounting Provisions – Key Issues

Prosecutions of Individuals Under the FCPA

US v. Bourke

- In November 2009 Frederic Bourke sentenced to:
 - a prison term of a year and a day
 - \$1 million fine
 - three years supervised release for his involvement in a bribery scheme in Azerbaijan in the late 1990s.
- Knowledge v. Willful Blindness



Prosecutions of Individuals Under the FCPA

US v. Warwick

- John Warwick pled guilty to FCPA violations for authorizing bribes of more than \$200,000 to former officials in the Panamanian government in order to secure business for Ports Engineering Consultants Corp. In June, 2010 he was sentenced:
 - 37 month prison term
 - 2 years of supervised release
 - Forfeit \$331,000
- In April, 2010 his co-conspirator Charles Jumet – received 87 month sentence – the longest ever for an FCPA violation

Facilitation Payments – Key Issues

- FCPA permits payments to government officials to perform routine governmental action (ministerial and non-discretionary functions)
- “Routine governmental action” does not include any decision by a foreign government official to award new business to or to continue business with a company
 - Processing of work permits, licenses and visas
 - Providing police protection, power and water supply, cargo handling or protection of perishable goods
 - Scheduling inspections associated with contract performance or transit of goods across country
- Must be accurately recorded in books and records
- Are these legal under local law, or do they qualify as “bribes” under local law?

Gifts and Hospitalities: Key Issues

- Gifts and “hospitalities,” including meals and travel, lodging, and entertainment expenses, provided to a foreign government official are the most common FCPA issues for multinational companies and their counsel
 - Nature, value and transparency of hospitality will assist in determining whether it is *corruptly* motivated
- FCPA affirmative defense: “reasonable and bona fide” expenses directly related to:
 - the promotion or demonstration of products or services, or
 - the execution or performance of a contract with a foreign government or its agency

Gifts and Hospitalities: Lessons Learned – UT Starcom

- \$7 million on 225 trips to Hawaii, Las Vegas and New York City
 - UTS-China then falsely recorded these trips as "training" expenses
 - “UTSI did not have adequate internal controls to determine whether the trips were in fact for training purposes”
- \$4 million for executive training programs for customers’ officials
 - Travel, tuition, room and board, field trips
 - Accounted for as “marketing expenses”

Gifts and Hospitalities: Lessons Learned – Veraz Networks

- Company paid between \$3,500 and \$4,000 in gifts to employees of state-owned telecommunications companies
 - Company learned of other improper \$35,000 payment offer by consultant and cancelled the transaction
- Unclear whether any business was procured as a result of these small gifts and entertainment payments
- Veraz settled with SEC for violations of the accounting provisions and a \$300,000 civil penalty
- "It is particularly important that newly public companies doing business overseas establish the appropriate policies and procedures to prevent a culture of payment to foreign officials from developing"
 - Marc J. Fagel, Regional Director of the SEC's San Francisco Regional Office

Intermediaries: Key Issues

- FCPA prohibits payments to third parties knowing or being substantially certain that some or all the payment of thing of value will be provided to a government official in order to obtain or retain business
 - No statutory definition of “third party”
 - SEC and DOJ construe “third party” broadly
- A company may be liable for the actions of an intermediary if the latter makes illegal payments, even if company had no actual knowledge of payments
- Focused due diligence is critical

Intermediaries: Specific Challenges

- The “No Brainers”
 - The uncle of the head of procurement
 - Sham Intermediaries
 - Sales consultant with no physical office or little industry experience
- Developing Trend – Focus on Misuse of Legitimate Intermediaries
 - Distributors
 - Dealers
 - Joint Venture Partners
 - Other legitimate arm’s length business partners

Lessons from Other Recent Cases Regarding Intermediaries

- Government focus on intermediaries interpreted broadly, perhaps to all service providers, including entities not previously expected to subject companies to liability, such as freight forwarders
 - Starting Point: In 2005, InVision was fined U.S. \$800,000 for improper payments made by its distributors and agents overseas
- Siemens: Government focus on use of several types of intermediaries and failure to conduct robust due diligence on the intermediaries
- Halliburton: Government focus on intermediaries and failure to conduct robust due diligence and maintain procedures around retention of intermediaries
- Veraz Networks – making/offering improper payments through reseller
- Technip – Conduct of joint venture in which issuer owns minority stake
- Daimler AG – Improper payments through vehicle dealers a basis for FCPA liability
- Panalpina – Swiss-based international freight forwarder alleged to have acted as agent for oil and gas companies in paying bribes



Questions?

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