

Doing Business in High-Risk Jurisdictions – the FCPA and You

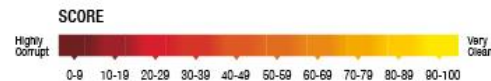
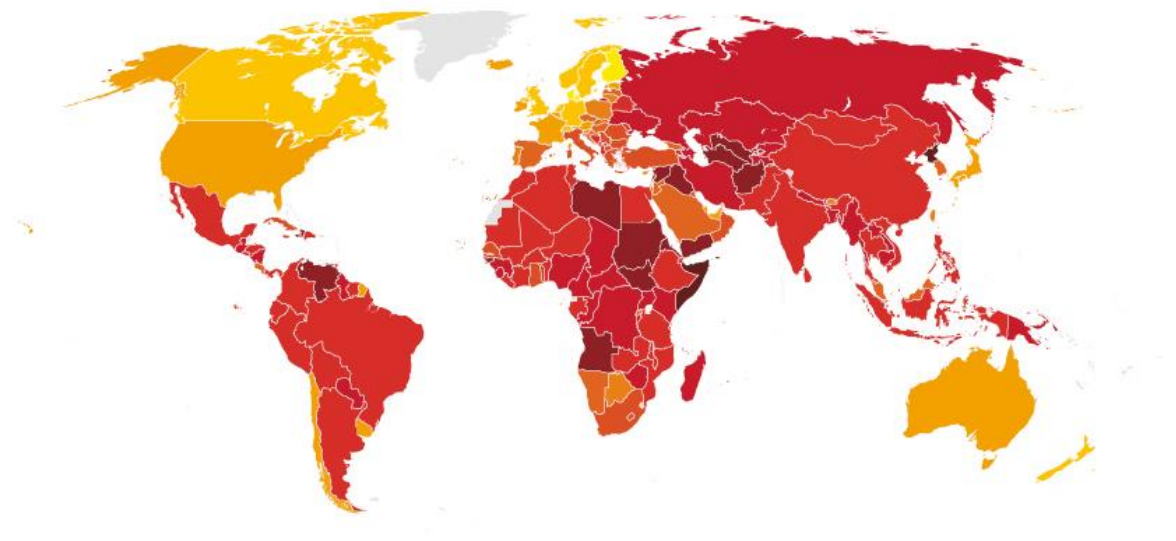
Doing Business in Eurasia
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Global Anti-Corruption Enforcement

Corruption – A Widespread Problem

Corruption Perceptions Index 2015



#cpi2015
www.transparency.org/cpi

Source: Transparency International

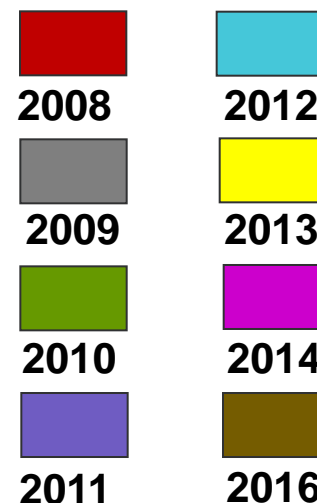
Global Enforcement Environment

- Global anti-corruption enforcement has dramatically increased
- Enforcement activity in part driven by OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (effective January 1999)
 - Ratified by 40 countries; requires signatories to enact implementing legislation that makes bribery a crime and an extraditable offense
 - Among the signatories are the U.S., Spain, France, U.K., Mexico, Brazil, Japan, and Russia
 - The OECD publishes regular monitoring reports grading signatory countries on their progress enforcing their implementing statutes
- A number of other global anti-bribery conventions in place such as the UN Convention against Corruption

U.S. Foreign Corrupt Practices Act

Siemens	\$800
Alstom	\$772
KBR/Halliburton	\$579
BAE	\$400
Total S.A.	\$398
VimpelCom Ltd.	\$397
Alcoa	\$384
ENI S.p.A.	\$365
Technip	\$338
JGC Corporation	\$219
Daimler	\$185
Weatherford	\$152
Alcatel-Lucent	\$137
Avon	\$135
Hewlett-Packard	\$108
Deutsch / Magyar Telekom	\$95
Marubeni Corporation	\$88
Panalpina	\$82
Johnson & Johnson	\$70
Pfizer / Wyeth	\$60

Top 20 FCPA Settlements (millions)



Key Enforcement Trends

- Increased cross-border enforcement agency cooperation.
- Expanded Enforcement
 - Aggressive jurisdictional bases (territorial, aiding/abetting)
 - Combining bribery with antitrust, money laundering, etc.
- DOJ and SEC committed to using aggressive investigation tactics irrespective of whether company cooperating.
- Increased FBI resources and commitments in FCPA investigations in the U.S. as well as abroad.
- Greater compliance awareness among companies and employees (Dodd-Frank whistleblower risk).



Key Enforcement Trends (cont.)

- DOJ focus on individual liability — “Yates Memo”
 - Instructs DOJ to prioritize prosecution of individuals responsible for corporate wrongdoing.
 - Companies must provide facts regarding responsible individuals to get any cooperation credit.
 - Individual defendants made up 80% of the DOJ’s FCPA docket in 2015.
 - Whenever the DOJ brought enforcement actions against corporations in 2015, it also prosecuted individual officers of those companies.
- Increasing focus on effectiveness of compliance programs.
- Most countries have robust anti-corruption laws (enforcement is a different matter).



Key Enforcement Trends (cont.)



- 84 ongoing FCPA investigations as disclosed by public companies in SEC filings.
 - Companies not subject to reporting are not included in the count; the actual number of investigations is much greater.
- China leads the countries reported to be involved in ongoing FCPA investigations with 28 mentions in company public filings.

Elements of the FCPA

The FCPA: What Is It?

- U.S. securities statute enacted in 1977 to prevent corporate bribery of foreign officials by U.S. companies
- Information surrounding “Watergate” hearings in U.S. in 1970s revealed large number of U.S. issuers paying bribes to foreign officials and political parties to obtain business
- Payments were hidden on companies’ books to disguise them from audit and public scrutiny

Prohibited Offenses

■ Anti-Bribery

- Prohibits U.S. persons and, in some cases, foreign persons from **corruptly** offering, authorizing, or **making payments**, or giving anything of value, **to any foreign official** or political parties for the purpose of **obtaining or retaining business**

■ Books and Records

- Issuers are required **to make and keep detailed books, records, and accounts** that fairly and accurately reflect transactions and dispositions of assets

■ Internal Accounting Controls

- Issuers must devise and **maintain internal accounting controls** to ensure that:
 - financial records and **accounts are accurate** for external reporting,
 - **access to assets** is permitted only in accordance with management instructions, and
 - the **books are audited** at reasonable intervals.

Regulated Parties & Jurisdiction

- The FCPA applies to:
 - Issuers: Publicly-traded companies and their officers, directors, employees, and agents
 - Domestic Concerns: U.S. private companies and U.S. persons, and their officers, directors, employees, and agents
 - Other Persons: Generally non-U.S. persons or entities and those entities' officers, directors, employees, and agents who act in furtherance of a bribe in the U.S.
- A foreign company (or person) can be subject to liability if it causes within the U.S., directly or indirectly, an act in furtherance of a corrupt payment

Elements of a Bribery Offense

- Elements –
 - A payment, offer, or promise (or the authorization of a payment, offer, or promise)
 - to provide “anything of value”
 - directly or indirectly (*i.e.*, through an intermediary)
 - to any “foreign [government] official”
 - with a corrupt intent

“Payment” or “Anything of Value”

- Examples –
 - Cash, gifts, benefits, favors, services
 - Employment or consultancy opportunities
 - Charitable donations
 - Political contributions
 - Medical, educational, or living expenses
 - Travel, meals, lodging, shopping, entertainment
 - Contracts or other business opportunities awarded to a company in which a foreign official has an ownership or other beneficial interest

“Foreign Official”

- Any officer or employee of:
 - Any non-U.S. government (e.g., mayor, governor, legislator)
 - Any department, instrumentality, or agency of a non-U.S. government (e.g., doctor at public hospital, director of Institute)
 - A foreign state-owned or controlled commercial entity
 - Any non-U.S. political party
 - Any public international organization (e.g., UNESCO, WHO)
 - Candidates for foreign political office
 - Influential member of royal family
- Foreign companies often have ties to foreign officials (e.g., state-owned airlines and oil companies)

“Corrupt” Intent

- Payments made to induce the recipient to misuse his official position to direct business to the payer or any other party. Includes payments intended to:
 - Influence any act or decision of a foreign official in his or her official capacity
 - Induce the foreign official to do or omit to do any act in violation of his or her lawful duty
 - Induce the foreign official to improperly use his or her influence to affect the decision or acts of another
 - Obtain an improper business advantage
- The corrupt payment need not succeed in order for there to be a violation as the offer or promise of a corrupt payment can violate the FCPA

Degree of Knowledge Required

- Reason to know payment is improper or made to a “foreign official” is enough constitute a violation
- Government may prove criminal intent through evidence of “conscious disregard” or “willful blindness”
- “Red flags” can be evidence of corruption-related activity engaged in by an employee or third party
- A company is at risk if it “turns a blind eye,” or ignores signs of possible bribery committed by an employee or a third party

Anti-Bribery & Accounting Provisions

- Bribes are almost never recorded as such in the books of a company
- Thus, an anti-bribery violation typically will include liability under the accounting provisions
- Any inaccurately recorded payment – even if it is not clear evidence of a bribe – can be construed as evidence of deficient internal controls
- This can expose a company to potential enforcement actions from both the DoJ and SEC

Exception

- Facilitating or “Grease” Payments
 - Gratuities given to government officials for performing essentially clerical activities not involving discretion (but to expedite service)
 - Examples include customs clearance, vehicle registration, visa renewal, police protection, and utilities service
- DoJ has referred to \$100 as general guide, although this is merely indicative
 - **Caution:** might breach local law

Criminal Penalties

- Anti-Bribery Provisions –
 - Up to \$2 M for each violation for companies
 - Up to \$100,000 and imprisonment of up to five years for individuals including officers, directors, stockholders, and agents of companies
- Accounting Provisions –
 - Up to \$25 M for each violation for companies
 - Up to \$5 M and imprisonment of up to 20 years for individuals
- Under the Alternative Fines Act (18 USC 3571(d)), the Government can assess penalties of up to twice the benefit from the bribe-related conduct

Civil Penalties

- Anti-bribery provision – business and individuals can be fined up to \$16,000 per violation (individuals cannot be reimbursed by their employers)
- Accounting provisions – an amount not to exceed the gross financial gain from the bribe as a result of the violations (*i.e.*, disgorgement of profits associated with the improper payments) or a specified dollar limitation
- These penalties can run into the hundreds of millions of dollars (see enforcement slide earlier in the presentation)

Common Red Flags

- Commissions or fees exceed the customary rate for similar services
- Over-invoicing or lack of standard invoices for payment requests
- Unusual credits granted to customers
- Use of cash as a form of payment
- Recommendation for use of an intermediary coming from a foreign official
- An intermediary lacks the qualifications to perform the services
- Requests for payment in a country other than that of an intermediary's registered headquarters or performance of services
- An intermediary's refusal to certify to anti-corruption representations
- Managers of foreign operations who have been paid unusual bonuses
- Extravagant gifts, hospitality or travel involving a foreign official

Recent FCPA Settlements

Louis Berger International (July 2015)

- Louis Berger International Inc. (LBI), a New Jersey-based construction management company, admitted to violations of the FCPA
- LBI agreed to pay a \$17.1 million criminal penalty to resolve charges that it bribed foreign officials in India, Indonesia, Vietnam and Kuwait to secure government construction management contracts
- Two of the company's former executives pled guilty to conspiracy and FCPA charges in connection with the scheme; they are scheduled to be sentenced in early 2016
- LBI entered into a DPA and admitted its criminal conduct, including its conspiracy to violate the anti-bribery provisions of the FCPA
 - The DPA requires that LBI implement rigorous internal controls, to continue to cooperate fully with the department and to retain a compliance monitor for at least three years
- World Bank debarred LBI from Bank-financed projects for one year

Mead Johnson Nutrition Company

(July 2015)

- Mead Johnson Nutrition Company, the infant formula manufacturer agreed to pay \$12 million to the SEC to settle allegations that it violated the books and records and internal control provisions
- SEC accused Mead Johnson of paying state-employed healthcare professionals in China to recommend its formula to mothers
- SEC alleged that Mead Johnson employees funded the improper payments through “distributor allowance” funds paid to distributors who market, sell, and distribute the company’s products in China
- Kara Brockmeyer, Chief of the SEC Enforcement Division’s FCPA Unit: “Mead Johnson Nutrition’s lax internal control environment enabled its subsidiary to use off-the-books slush funds to pay doctors and other health care professionals in China to recommend its baby formula and give the company marketing access to mothers”

BNY Mellon Corp (August 2015)

- SEC charged BNY Mellon Corp. with FCPA violations alleging that the company provided “valuable student internships to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund” to corruptly influence officials to obtain business managing and servicing the assets of the fund
 - BNY Mellon agreed to pay \$14.8 million to settle charges
 - The first enforcement action based exclusively on improper hiring of spouses or children of foreign officials
- Since 2013, the SEC has been investigating J.P. Morgan Chase’s Asian hiring program called “Sons and Daughters” for potential FCPA violations. In 2014, the SEC sent letters to Credit Suisse Group, Goldman Sachs, Morgan Stanley, Citigroup and UBS seeking information about their hiring.
- Lesson: Once one company is in FCPA cross-hairs, others will follow (e.g., Brazil cases that started with Petrobras scandal)

Focus on Individuals: Rincon-Fernandez and Shiera-Bastidas (December 2015)

- DOJ unsealed indictment of Roberto Enrique Rincon-Fernandez (President) and Abraham Jose Shiera-Bastidas (Agent) of Texas-based oil services company Tradequip Services & Marine
 - Arrested in Houston and Miami, respectively
 - Alleged: between 2009 and 2014 they conspired to secure energy contracts from Venezuela's state-owned energy company, Petróleos de Venezuela S.A. ("PDVSA"), via corrupt payments to PDVSA officials; paid millions of dollars to their "aliados" (allies) on PDVSA's contract steering committees to stack the list of companies eligible to bid on contracts with multiple companies owned or controlled by them, thus giving the false appearance that the bids were competitive
- Substantive and conspiracy FCPA bribery charges; also charged with money laundering

FCPA Special Concerns

Common FCPA Problems

- Vague definition of government official
- Offshore intermediaries and payments
- Joint venture and business partners
- Kickbacks to officials of government-owned customers
- Charitable donation and social contribution requests
- Gifts and hospitalities: low limits and various restrictions
- Sponsorship of overseas travel and educational meetings



Special Concerns

- Hospitality expenses
- Intermediaries
- Charitable contributions

Special Concern: Intermediaries

- Company can be liable for the actions of an intermediary if the latter makes illegal payments even if company had no actual knowledge of payments
- Intermediaries can be agents, consultants, representatives, distributors or other service providers
- Important to conduct due diligence on each intermediary to ensure that it is:
 - Reputable (has requisite experience)
 - Credible (obtain business references)
 - Financially stable
 - Willing to comply with law

Special Concern: Intermediaries (cont.)

— Due diligence on third parties

- Investigate the relationship between the intermediary and any foreign official, for example:
 - Foreign official employees, directors officers or shareholders
 - Is the intermediary a current or former foreign official
 - Close family members who are foreign officials
 - Other connections that raise concern
- Establish the intermediary is qualified for the work
- Evaluate proposed compensation for reasonableness given market and services provided

Special Concern: Intermediaries (cont.)

- **Due diligence on third parties (cont.)**
 - Evaluate the reputation of the third party
 - Investigate red flags
 - Ensure that any third party is aware of applicable anti-bribery laws and your company's compliance policies
- Most FCPA enforcement actions today involve bribe payments indirectly through third parties, so . . .
 - Critical to have a diligence process for third parties that is appropriately scaled for the level of risk
 - Third-party diligence is standard business practice

Special Concern: Intermediaries (cont.)

INTERMEDIARY RED FLAGS

- Prospective agent proposes unusual payment patterns, high rates, structure, off-shore bank account
- Lack of transparency in partner's expenses and records
- Agent's lack of qualifications or resources to perform services
- Recommendation of partner by official of potential government customer
- History of corruption in locale of intended business
- Agent or consultant resides outside the country where services rendered
- Money passing through agent or consultant to foreign official to obtain certain actions
- Prior accusations involving the agent or consultant

Special Concern: Intermediaries (cont.)

INTERMEDIARY RED FLAGS (II)

- **Consultant is connected with foreign official or political leader, e.g., the consultant is related to the official or has professional association with foreign government or political party**
- **Requests that payments be made in a third country or to another entity**
- **Requests that commission payments be made before contract is awarded**
- **Payments appear higher than standard rates in country or higher than industry practice**
- **Request for “success fee” for their services**
- **Insistence by the foreign customer that a particular person be used as an intermediary**
- **Refusal to certify compliance**

Special Concern: Hospitality Expenses

- Meals, lodging, entertainment and travel expenses provided to foreign government officials may give rise to liability under the FCPA
- “Reasonable and bona fide” expenses are the affirmative defense: includes expenses (i) directly related to the promotion or demonstration of products or services, or (ii) the execution or performance of a contract with a government agency

Special Concern: Hospitality Expenses (cont.)

- Excessive hospitality payments will be viewed as improper
- Be aware of the cumulative effect of repeated instances of meals and entertainment of lesser value
- No hospitality should be extended to family members
- Actions of competitors and local traditions and business practice, if excessive, are not an excuse

Special Concern: Hospitality Expenses (cont.)

— Gifts

- Gifts to foreign officials fall within scope of the FCPA
- Includes nominal, socially customary gifts (such as red/green packets during religious or cultural festivals)
- No *de minimis* threshold (i.e., even low-value gifts can raise liability concerns if given for improper reason)
- Gift may be permissible if:
 - Compliant with local law
 - Reasonable, bona fide, in connection with product/contract, and documented
 - Not for a corrupt purpose

Special Concern: Charitable Contributions

- Contributions (monetary or otherwise) to social and charitable projects should be handled with caution because they can be conduits for corrupt payments
- Companies must take appropriate steps to ensure that funds are used solely for the designated project
- Companies must exercise vigilance in the choice of contractors and be cautious in using contractors recommended by government officials

Special Concern: Charitable Contrib'ns (cont.)

- When contributing to a project, such as an educational fund, clear and fair guidelines on eligibility and the application process must be applied consistently and some due diligence may need to be performed.

Special Concern: Charitable Contrib'ns (cont.)

Charitable Contributions Red Flags

- Charities, projects or contractors recommended by government officials
- Donations under direction or suggestion of a government official (i.e., “dues” to obtain business)
- Charities headed or managed by government officials or that have connections with government officials (e.g., government officials on board of directors)

QUESTIONS?





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Mr. Nelms counsels national and international clients on internal corporate investigations, compliance-oriented mergers and acquisitions due diligence, and the development and implementation of comprehensive compliance programs. His work focuses on issues involving the FCPA and related federal legislation, including US anti-money laundering laws and their application to multinational companies in emerging markets, particularly those of the former Soviet Union.