



Representing U.S. Companies Abroad in Accordance with the Foreign Corrupt Practices Act (FCPA) & UK Bribery Act

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Presenters



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- In that role Ms. Lanthier provides legal support to Marriott's operations business unit in Europe, the Middle East and Africa, including compliance issues.
- Prior to joining Marriott, Ms. Lanthier was a counsel at the law firm of O'Melveny & Myers LLP
- Ms. Lanthier received her J.D. from Stanford Law School and an M.A. in International Relations and Economics from the Johns Hopkins School of Advanced International Studies.



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- Provides extensive consulting services to companies and law firms in a wide range of matters, including securities litigation, forensic accounting and fraud investigations, FCPA and corruption investigations, specifically focused in the hospitality industry.
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FCPA OVERVIEW AND ENFORCEMENT TRENDS

FCPA Overview

- The FCPA is a US statute enacted in 1977 after Watergate and revelations of foreign bribery involving U.S. companies. Substantially amended in 1988 and 1998 (to expand law and bring FCPA into conformity with Organization for Economic Co-operation and Development (“OECD”) Convention).
- The FCPA has two provisions:
 - The **Anti-Bribery provision** states: “A company cannot corruptly make an offer, promise, or payment of ‘anything of value’ to a ‘foreign government official’ or politician for the ‘purpose of influencing his or her official actions’ for the advantage of the company.” (17 U.S.C § 78dd-1 et seq.)
 - Enforced by the Department of Justice
 - The **Books and Records provision** requires companies who file reports with the SEC to maintain accurate books and records and also to maintain an adequate system of internal controls
 - Enforced by the Securities & Exchange Commission

Anti-Bribery Provisions: “Anything of Value”



- Money or cash (e.g. “commissions”)
- Free or discounted accommodations
- Flight or hotel upgrades
- Gifts
- Hospitality and entertainment, including meals
- Contributions to charitable organizations
- Political contributions
- Employment or promise of employment
- Confidential information that confers potential benefit
- Stock and other investment opportunities
- Waivers of rules that normally would apply
- Letters of recommendation

Anti-Bribery Provisions: “Foreign Government Official”



Any officer or employee (includes low level employees and officials) of a foreign government, including:

- Representatives of National or Regional government, such as:
 - Ministries of tourism and government-controlled visitors’ bureaus
 - National customs authority
 - Agencies responsible for assessment or collection of taxes, duties, government-imposed fees
 - Agencies responsible for labor or worker rights
 - Employees of embassy or consulate
 - Immigration bureau personnel
 - Airport authority representatives
- Municipal Employees, including:
 - Members of city council,
 - Officials from local bureaus or offices responsible for issuing permits
- Government-owned or controlled business enterprises, including state-owned tour operators and food and beverage vendors
- Party officials and political candidates
- Can include relatives or close friends of any of the above

Anti-Bribery Provisions: Corrupt Intent

- Prohibition on making payments with “corrupt intent” is extremely broad
- Prohibits all attempts to influence government action through arrangements that personally benefit a foreign government official:
 - To **secure future business**
 - To **retain business**
 - To **divert business** from a competitor
 - To obtain **preferential treatment** that could be leveraged to increase competitiveness:
 - In order to avoid tax obligations
 - In exchange for supplementary police protection

Books and Records

- The **Books and Records provision** require companies who file reports with the SEC to maintain records that accurately reflect transactions and the nature and quantity of corporate assets and liabilities.
 - FCPA Books and Records focus is on:
 - How the “bribe” is recorded on the books;
 - G/L classification for payment;
 - Business purpose reflected in underlying business records;
 - Applies even if parent owns less than 50% of a subsidiary
 - Good faith requirement
 - Amounts need not be material to constitute violations of the FCPA
 - May conduct joint or parallel investigations with the DOJ



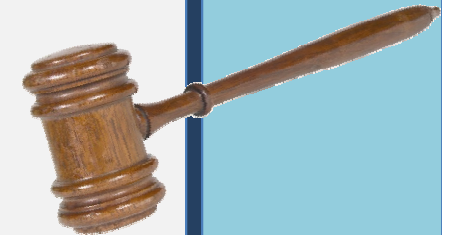
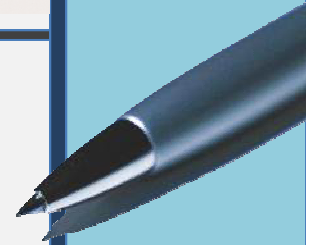
Reach and Implications

- Source of the alleged bribe does not have to be in the U.S.
- The actions of an agent, consultant, representative and “business partners” acting “on behalf” of the company will be attributed to the company
- The government can potentially establish nexus by virtue of a single e-mail between the U.S. and the foreign subsidiary
- The actions of the foreign subsidiary will be attributed to the U.S. parent even if sub goes to great lengths to disguise illegal payments
- Successor liability for illegal acts of acquired companies
- Foreign “issuers” subject to FCPA
- On average more than half of new FCPA investigations have been on foreign corporations vs. domestic corporations



Global Trends in Anti-Corruption Enforcement

- Whistleblower incentives under Dodd-Frank
- Continued high level of activity
- Prosecution of individuals
- Aggressive tactics
- Multi-jurisdictional investigations
- International cooperation
- Foreign companies and individuals targeted
- Voluntary disclosure
- Enforcement of multiple corruption crimes together



Top 10 FCPA Settlements



Company	Amount	Year
Siemens	\$800 million	2008
KBR/Halliburton	\$579 million	2009
BAE	\$400 million	2010
Snamprogetti Netherlands B.V./ENI S.p.A	\$365 million	2010
Technip S.A.	\$338 million	2010
Daimler AG	\$185 million	2010
Alcatel Lucent	\$137 million	2010
Panalpina	\$82 million	2010
ABB	\$58 million	2010
Pride International	\$56 million	2010

Take Away Messages for Companies

- Directors and officers face increased liability for the actions of others
- Effective and routine risk assessment will be a critical component of an anti-bribery compliance program
- Senior executives will be targeted for possible knowledge, willful blindness or inadequate oversight
- Companies must now tailor programs for the specific risks in country
- Parallel investigations by multiple jurisdictions may become common, resulting in extraordinary costs and penalties

UK BRIBERY ACT

The UK Bribery Act

- On July 1, 2011, the UK Bribery Act comes into force and brings with it the most stringent anti-bribery regime in the world. Applies to:
 - Dealings with foreign officials
 - All business dealings
 - All “UK” persons doing business anywhere in the world
 - Companies which fail to prevent bribes from being made on their behalf
 - Applies to all companies which carry out all or part of their business in the UK
- Act sets out 4 offenses:
 - Bribing
 - Being bribed
 - Bribing a foreign public official
 - Failing to prevent bribery
- The only defense for an organization is to have adequate procedures in place to prevent a bribe being paid

Bribery Act 2010 vs. FCPA: Key Differences



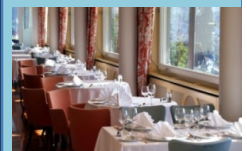
	Bribery Act	FCPA
Anti-bribery provisions	Criminalizes commercial and public bribery; receipt of a bribe; failure to prevent bribery	Criminalizes bribery of foreign officials only; other U.S. laws reach commercial bribery and receipt of bribes
Failure to prevent bribery: strict liability	Creates a <u>new strict liability</u> corporate offense for the failure of a corporate official to prevent bribery	No strict liability under the anti-bribery provisions. Enforcement trend, however, suggests corporate officials may face penalties for failing to ensure that policies and procedures prevent and detect violations
Treatment of expenses in connection with promotional activities	No exception or affirmative offense for expenses in connection with promotional activities — certain types of corporate hospitality are prohibited if they are intended to secure a business advantage	Affirmative defense available for reasonable and bona fide business expenses related to certain promotional activities
Treatment of facilitation payments	No exception or affirmative defense for facilitation or “grease” payments	Exception for facilitation or “grease” payments to secure or expedite a routine governmental action
Corporate compliance programs	Entity not liable for failure to prevent bribery if it can show it had adequate procedures in place to promote compliance	Compliance programs not a defense to liability, though sentencing guidelines allow for reduction in fines and penalties
Penalties	Companies — unlimited fine Individuals — unlimited fine and imprisonment up to 10 years	Limits on fines for both companies and individuals

CORRUPTION RISK AREAS/RISK ASSESSMENTS/AUDITS

Potential Corruption Implications in Hospitality Sector



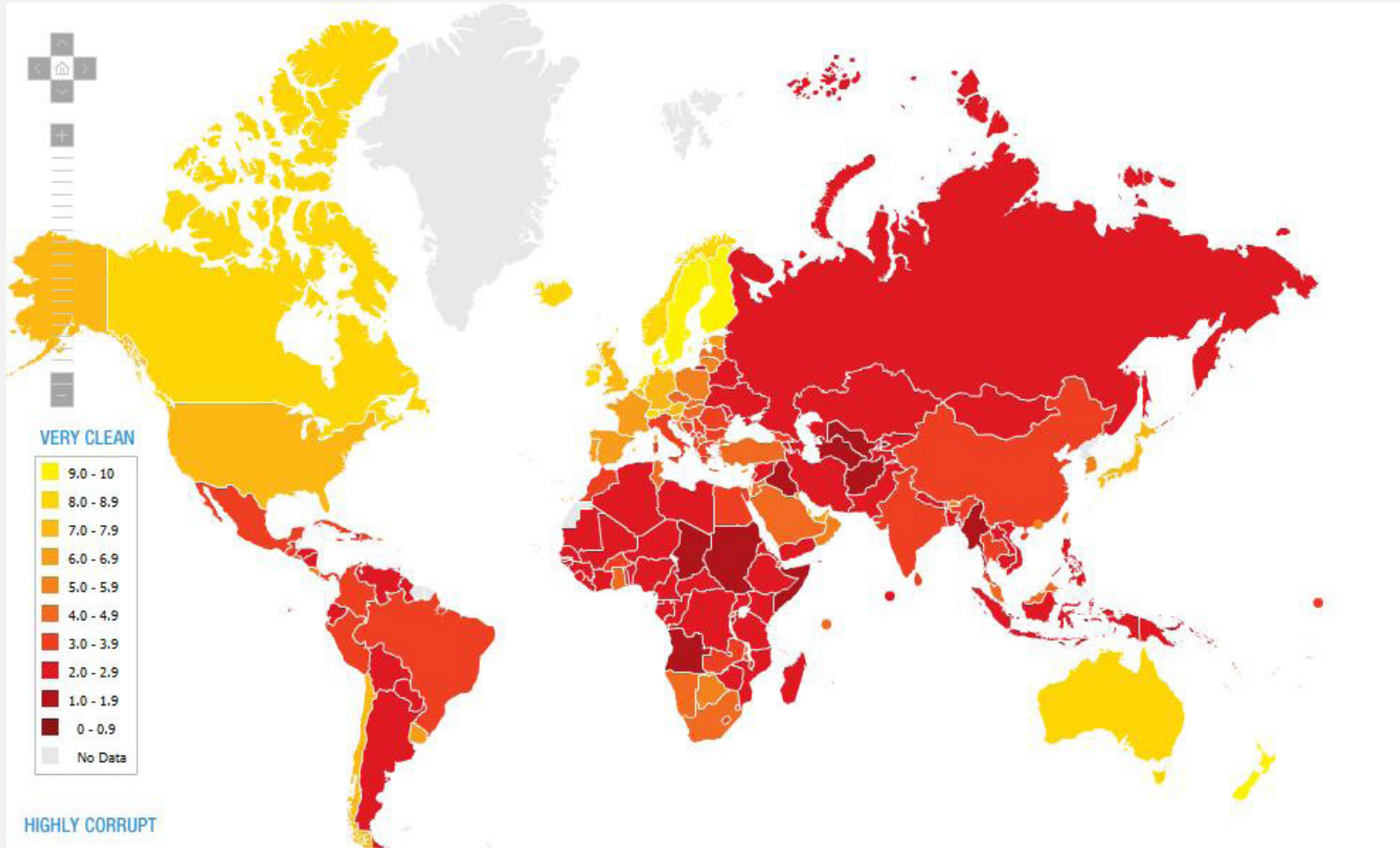
- Payments to government officials or state controlled entities (via agents or consultants) to secure the acquisition of a property or franchise
- Payments made to government officials related to the construction of hotel properties, such as permits, licenses, land use, labor, utilities, and environmental concerns
- Obtaining food and beverage permits
- Payments to evade health inspections, liquor licensing or similar local requirements
- Lending to franchise owners to facilitate bribes to government officials in order to secure on-going operations of the hotel property
- Payments or lavish entertainment or other benefits made to government officials in order to secure government conferences and assure government rates
- Use of “comps” at and travel to hotel property to facilitate potential bribes to government officials
- Advertising on state-owned or operated television or radio stations;
- Payments to tax inspectors and real estate assessors to achieve favorable tax treatment or avoid penalties



Recent Corruption Cases/Matters

- US v. York International (2007)
- US v. Gerald Green and Patricia Green (2009)
- Elliott Mayisela, Department of Health, Pretoria, South Africa 2009)
- Hotel La Calypso, Goa, India (2009)
- SEC subpoena to Las Vegas Sands regarding compliance with the FCPA (2011)

Perceived Corruption Risk by Country



Considerations in a Risk Assessment

- Consider who should be involved
- Assess “Attorney Client Privilege”
- Determine scope/objectives/budget
- Clearly articulate working definitions of “corruption” and “bribery”
- Review existing training materials, controls and oversight programs
- Brainstorm/document qualitative and quantitative risk factors
- Verify findings with each business unit and explain the deficiencies and risk areas
- Remediate significant deficiencies immediately
- Evaluate significance and likelihood of risks and focus on those that are of the highest risk first
- Evaluate existing controls to determine their adequacy
- Modify controls and FCPA compliance program/training programs as appropriate
- Disseminate findings and observations throughout organization
- Retest noted deficiencies and gaps after remediation efforts have taken place

Areas to Consider in Anti-Corruption Audits

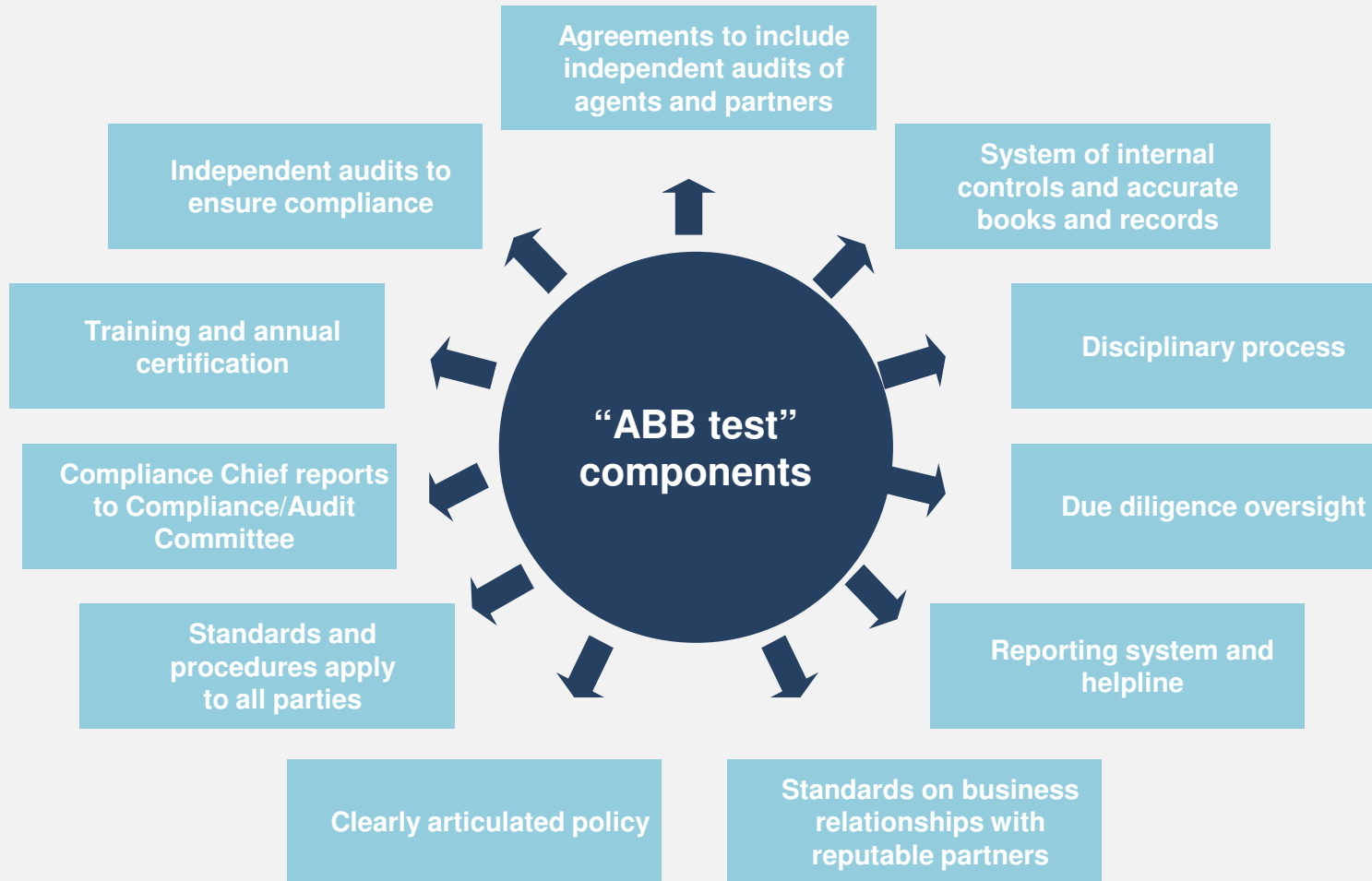


- Review of third party agreements and associated payments
- Analysis of high-risk general ledger accounts
- Payments to professional service providers
- Charitable contributions and political donations
- Payments for gifts, travel, and hospitality provided to foreign officials
- Review of expense reports of high-risk employees
- Significant write-off of accounts receivable
- Invoice credits and zero-dollar invoices to high risk customers
- Compliance with and awareness of FCPA policies and procedures
- Petty cash activity and cash advances
- Evaluation of tax, environmental, or other disputes with governmental agencies



EFFECTIVE COMPLIANCE/ MONITORING

Components of an effective Anti-Corruption Compliance Program



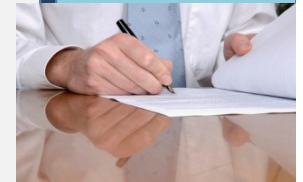
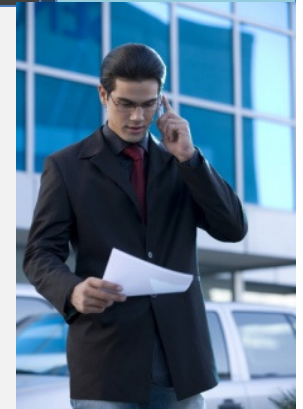
Importance of Monitoring Activities

- Health Checks
- Surveys of employees, independent contractors, and employees of newly acquired businesses
- FCPA-focused risk assessments
 - Violators often know a transaction is illegal, and attempt to hide it from financial records.
- Analytic Tests of Data
- Best Defense Related to Government Inquiry
 - Effective controls
 - FCPA compliance program
 - Ongoing monitoring activities



Responding to Potential Violations

- Stopping the suspect activity — suspending questionable payments
- When to terminate suspect employees/third parties?
- Document preservation, including electronic data
- Investigating — when can you rely on internal resources (e.g., internal audit) and when do you use outside resources (forensic accountants)
- Inside or outside counsel and what triggers reporting to audit committee
- To disclose or not to disclose to the government
- Remedial actions:
 - Enhancing controls
 - Disciplining violators
 - Conducting additional training
 - Correcting books and records
 - Looking for similar problems elsewhere and identifying and correcting weaknesses



CASE SCENARIOS

Scenario # 1

Your company has started hiring personnel for the fulfillment of various tasks related to the opening of a new hotel property. The recruitment process is almost complete and local and foreign candidates have been selected to operate the property. You must obtain work permits from the local authorities for all candidates. Local officials have requested that you pay an unofficial "surcharge" for each work permit. A delay in hiring your employees will have a significant adverse effect on the opening of the hotel.

- Questions:
 - How do you reduce the probability of the demand being made?
 - How do you react if the demand is made?

Scenario # 2

A high-ranking government official asks your property manager to provide free rooms for his son's wedding taking place at the property. Your company feels pressure to comply with the request to maintain its good relationship with the official, especially since the official is able to influence the authorization of permits/licenses and provide other government benefits necessary for expansion of the property.

- Questions:
 - How do you reduce the probability of the demand being made?
 - How do you react if the demand is made?

Scenario # 3

Your company has just commenced construction a new property in an emerging market. The local authorities require the company to receive a special construction permit prior to any work being performed. While the Company's application for a permit is still pending, you begin minor construction on the land. Under local law, a significant penalty would be incurred for starting any construction without the permit.

To avoid the penalty, a company employee says he is able negotiate a "settlement" with the legislator, whereby both the city inspector and legislator will be paid U.S. \$1,750 in cash, in order for the inspector to allow the back dating of the city's permit to the Company.

- Questions:
 - How do you reduce the probability of the demand being made?
 - How do you react if the demand is made?

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