

Keeping Options Open: Internal Investigations and Anti-Corruption Laws

Presenters



Anthony J. Campanelli | Senior Manager | Deloitte Financial Advisory Services LLP

- 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.
- Mr. Campanelli is Certified Public Accountant (CPA) in the States of New York and New Jersey and has earned the credential of Certified in Financial Forensics (CFF) by the American Institute of Certified Public Accountants (AICPA).



Veronique Lanthier | Vice President and Senior Counsel | Marriott International, Inc.

- 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



Stephen A. Miller | Member | Cozen O'Connor

- Served as a federal prosecutor for nine years in New York City and Philadelphia focusing on complex international cases.
- Counsels clients in compliance matters relating to export-control laws and the FCPA, as well as conducting internal investigations into potential violations of those laws.
- Graduated *summa cum laude* from both Princeton University and Northwestern University School of Law, and served as a law clerk to Justice Antonin Scalia on the U.S. Supreme Court.

Outline

- Breadth of Anti-Corruption Laws
 - Foreign Corrupt Practices Act (FCPA)
 - International Cooperation and Enforcement
- Prevention and Response — Best Practices
- Preserving Attorney-Client Privilege in Internal Investigations
- Deciding Whether to Self-Report Misconduct

Foreign Corrupt Practices Act

15 U.S.C. § 78dd-1, *et seq.*

Who Enforces?



Foreign Corrupt Practices Act

15 U.S.C. § 78dd-1, *et seq.*

What does it prohibit?

- 1) Domestic concerns and issuers [includes all U.S. persons and companies]
- 2) Using instrumentalities of interstate/foreign commerce
- 3) corruptly
- 4) in furtherance of an offer, payment, promise to pay, or authorization of payment of money or **anything of value**
- 5) Directly or indirectly
- 6) to a foreign official
- 7) for the purpose of influencing any act or decision of that official in official capacity to obtain or retain business



FCPA— Incredible Breadth

- All U.S. persons and companies



FCPA— Incredible Breadth

- Anything of Value



FCPA— Incredible Breadth

- Directly or Indirectly



FCPA— Incredible Breadth

- Foreign Official



FCPA— Incredible Breadth

- Obtain or Retain Business

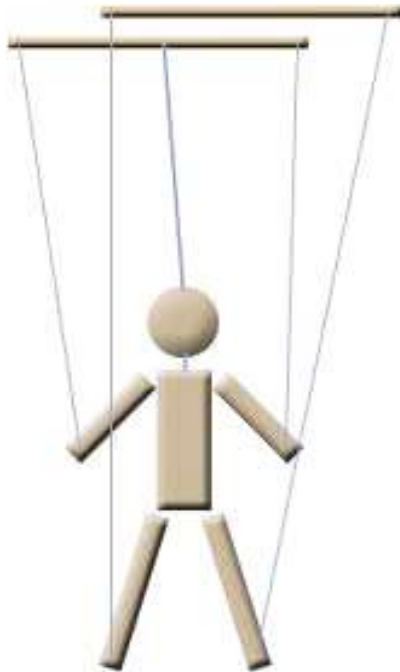
United States v. Kay, 513 F.3d 432 (5th Cir. 2007)



FCPA— Incredible Breadth

- *Proving Guilty Knowledge*

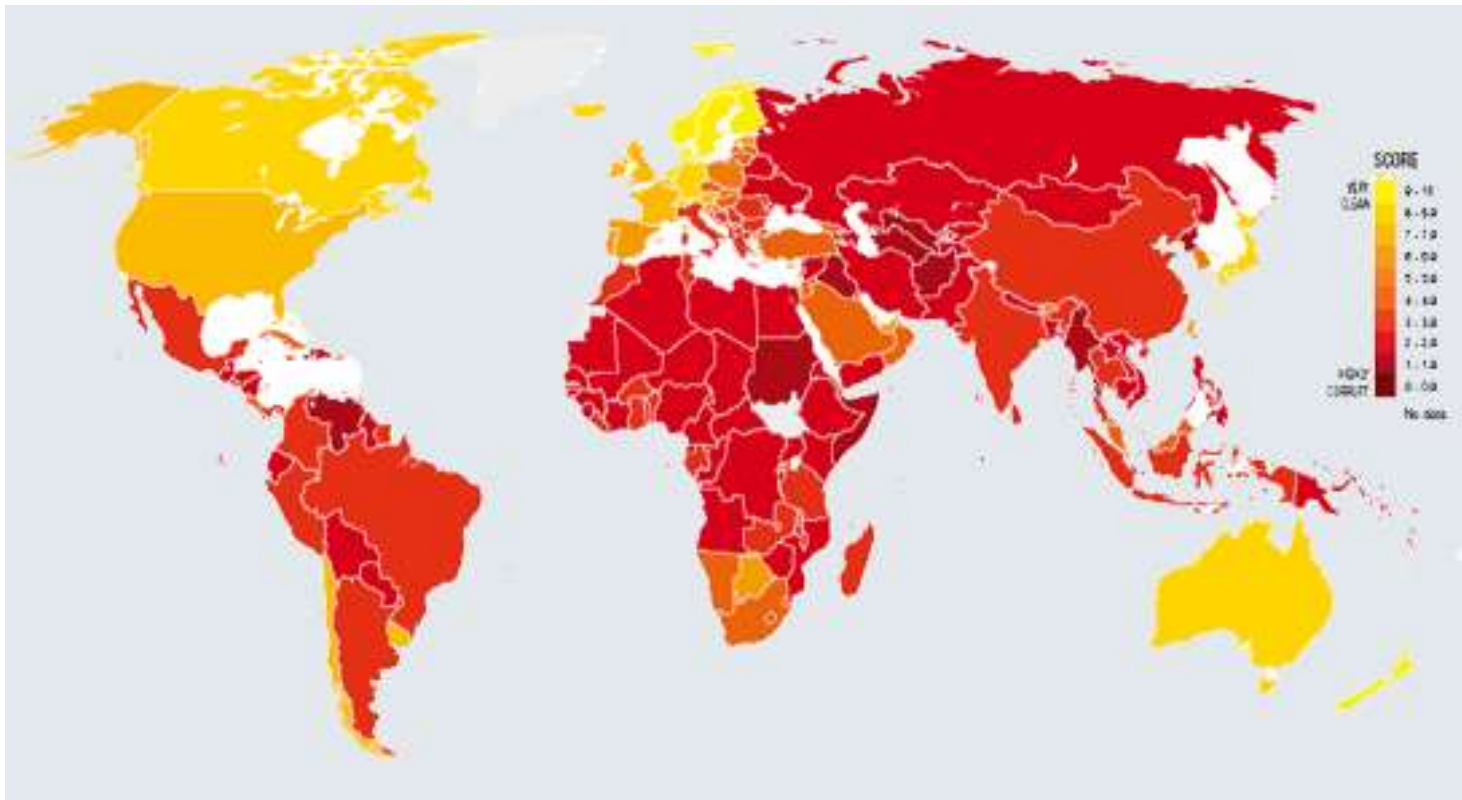
Control Person Liability



Conscious Avoidance



FCPA – Substantial Risk?



Source: Transparency International

FCPA – Consequences of Violation



Jail



Civil/Criminal Penalties













Civil Lawsuits



Debarment

FCPA – Notable Results

 (Germany)	\$800 million	2008
 (USA)	\$579 million	2009
 (UK)	\$400 million	2010
 (Holland/Italy)	\$365 million	2010
 (France)	\$338 million	2010
 (Japan)	\$218.8 million	2011
 (Germany)	\$185 million	2010
Alcatel-Lucent  (France)	\$137 million	2010
 (Switzerland)	\$81.8 million	2010
 (USA)	\$70 million	2011

See also “ calling?”

International Cooperation



U.K. Bribery Act

- Effective July 1, 2011
- Applies to:
 - Dealings with foreign officials
 - All business dealings
 - All “U.K.” 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 U.K.
- Act sets out 4 offenses:
 - Bribing
 - Being bribed
 - Bribing a foreign public official
 - Failing to prevent bribery



U.K. Bribery Act — Comparison with FCPA

Similarities

- Long-arm jurisdiction
- Broad scope, including payments by third parties

Differences

- Covers private, commercial bribery
- No exceptions
- Comprehensive compliance program may be affirmative defense to “failure to prevent bribery” charge

Prevention & Response

— Best Practices

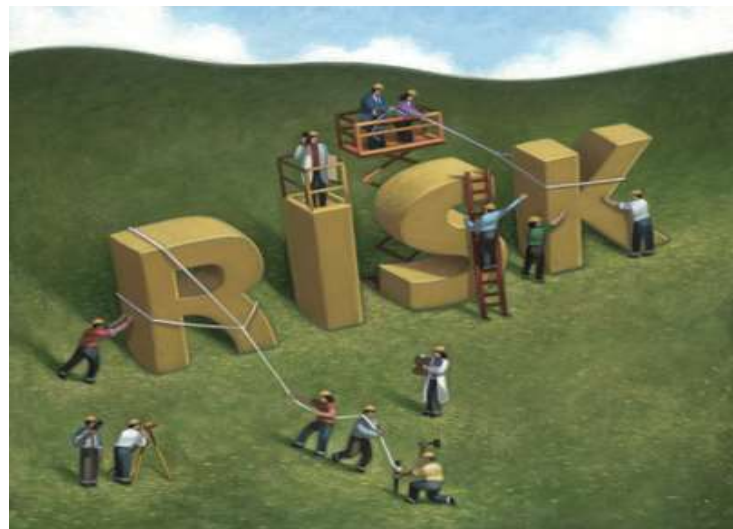
Specific Examples of Risks for Hospitality Industry

- Payments to government officials or state-controlled entities (via agents or consultants) to secure the acquisition of a property or franchise
- Payments 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, or 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 a hotel property
- Lavish entertainment or other benefits bestowed on government officials 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

Prevention & Response

— Best Practices

- Start with comprehensive assessment of your risks:
 - Examine interactions with foreign government officials
 - Search for potential sources of violations
 - Identify “red flags”
- Address potential risks:
 - Develop targeted, efficient compliance programs and procedures
 - Implement training programs
 - Establish an easily accessible reporting program for violations



Prevention & Response

— Best Practices

Internal Investigations

- Get to the bottom of the complaint
- Stop the bleeding, if necessary
- Demonstrate a “culture of compliance”



Preserving Privilege



- Establish Clear Boundaries
- Avoid Conflicts of Interest
- Sharing Information with Experts/Consultants

Privilege Belongs to Company, Not Employees



Upjohn Co. v. United States, 449 U.S. 383 (1981)

Upjohn Co. v. United States, 449 U.S. 383 (1981)



Control group test lacked certainty and frustrated major purpose of privilege: full and frank communication in service of rendering legal advice.

Upjohn Co. v. United States, 449 U.S. 383 (1981)

Privilege existed where:

- 1) communications were made by Upjohn employees;
- 2) to counsel for Upjohn acting as such;
- 3) at the direction of corporate superiors;
- 4) in order to secure legal advice from counsel;
- 5) concerning matters within the scope of the employees' duties; and
- 6) employees "were sufficiently aware they were being questioned in order that the corporation could obtain legal advice"

Codification of *Upjohn*

- ABA Model Rule 1.13(a): “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
- ABA Model Rule 1.13(f): Company’s counsel must identify the limited scope of his/her representation “when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents.”

Sample Cases



United States v. Stein (S.D.N.Y. 2006)

Sample Cases



In re Grand Jury Subpoena (4th Cir. 2005)

Sample Cases



United States v. Ruehle (9th Cir. 2009)

Upjohn Warnings



Best Practices:

- Before every interview, clarify that counsel represents the company and does not represent the witness personally.
- Verbal warning is sufficient, but take care to record in notes whether and how witness demonstrated his understanding of counsel's limited role.

Avoiding Conflict of Interests

Applicable Rules

- Model Rule 4.3(b):

During the course of a lawyer's representation of a client, a lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonable should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

- Comment 10 to this Rule:

Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussion between the lawyer for that organization and the individual may not be privileged.

Avoiding Conflict of Interests



Best Practices:

- Always provide *Upjohn* warnings
- If interests are known to be adverse, consider proactively advising employee of right to separate counsel (and payment policy)
- Do not give advice if employee asks whether she needs her own lawyer.

Sharing Information with Consultants/Experts

- Applicable Rules
 - *United States v. Kovel* (2d Cir. 1961)
 - Proposed Federal Rule of Evidence 503 (not yet adopted)



Protects communications that “facilitat[e] the rendition of professional legal services to the client,” such as communications:

“(1) between himself or his representative and his lawyer or his lawyer’s representative, or (2) between his lawyer and his lawyer’s representative, or (3) by him or his lawyer or a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.”

Sample Cases



United States v. ChevronTexaco Corp.
(N.D. Cal. 2002)

Sample Cases



FTC v. GlaxoSmithKline
(D.D.C. 2002)



In re Copper Market
(S.D.N.Y. 2001)



Sharing Information with Consultants/Experts



Best Practices:

- Consultants/Experts should be engaged by counsel.
- Engagement letter should emphasize that services are retained for the purpose of facilitating fully informed legal advice in anticipation of litigation.
- Any communications involving consultants should prominently display a “PRIVILEGED” legend.

Self-Reporting

Advantages

- mitigate severity of punishment
- release information on company's own terms, esp. if it is likely to come out anyway
- good corporate citizenship
- opportunity to demonstrate "culture of compliance" to employees and prosecutors



Disadvantages

- forfeit leverage with prosecutors
- give up chance that misconduct would have remained undetected
- invite wave of parallel civil lawsuits

Questions

Any questions?

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