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Anti-Corruption Compliance and Enforcement Trends in the United States and Globally

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Regulatory | Litigation | Transactional



Overview of Anti-Corruption Laws

- Anti-corruption laws include:
 - US Foreign Corrupt Practices Act (“FCPA”)
 - UK Bribery Act
 - PRC’s Anti-Unfair Competition Law
 - Mexico’s General Law of Administrative Responsibility
 - Brazil’s Clean Company Act
 - France’s Sapin II Law
 - Korea’s Improper Solicitation and Graft Act
 - OECD Anti-Bribery Convention
 - Various other local criminal laws



Overview of Anti-Corruption Laws

- Anti-corruption laws serve to:
 - Promote government accountability
 - Encourage fair competition
 - Protect corporate assets
 - Ensure transparency within companies



Overview of the FCPA

- **FCPA Anti-Bribery Provisions:** Prohibit bribing any “foreign official” (i.e., non-U.S. government official) for the purpose of influencing the official or securing any improper business advantage
- **FCPA Accounting Provisions:**
 - Require “issuers” (i.e., public companies) to (1) make and keep accurate, reasonably detailed **books and records**; and (2) devise and maintain an adequate system of **internal accounting controls**
 - Prohibit knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls

Overview of the FCPA

- The FCPA's anti-bribery provisions apply to:
 - “Issuers” and their directors, officers, employees, agents – anywhere in the world;
 - “Domestic concerns” (i.e., U.S. persons and businesses) and their directors, officers, employees, agents – anywhere in the world; **and**
 - Any person taking acts in furtherance of a corrupt payment while in the territory of the United States
- Authorities also may charge people with aiding and abetting violations of, or conspiring to violate, the FCPA
- **Takeaway:** U.S. law may apply to you, even if you are not American, even if you are not employed by an American company, and even if your misconduct takes place outside the United States

Overview of the FCPA

- The FCPA is enforced by:



Key Concepts and Risk Areas



FCPA Compliance Key Concepts

- The FCPA anti-bribery provisions prohibit:
 - Paying, giving, offering, promising, or authorizing the paying or giving
 - Of “anything of value”
 - Corruptly
 - To a foreign government official
 - Directly or indirectly (e.g., through a third party)
 - With the intention of improperly influencing or inducing any act, decision, or failure to act, or securing an improper advantage in connection with obtaining or retaining business

Let's break it down...

Key Concept: Anything of Value

- “**Anything of Value**” is **broadly** defined to include anything used to improperly influence someone, particularly a government official:
 - Cash
 - Checks
 - Wire transfers
 - Gift cards
 - Travel
 - Hotels
 - Meals
 - Entertainment
 - Luxury goods
 - In-kind gifts or services
 - Business referrals
 - Ownership interest in companies
 - Employment, internships, or consulting positions
 - Discounts/rebates
 - Charitable contributions

Key Concept: Government Official

- Government officials include
 - Officers, employees, members, or agents of a:
 - Government
 - Department, agency, political subdivision, or instrumentality of a government
 - State-owned enterprise
 - Royal family
 - Public international organization
 - Elected officials
 - Political candidates or party officials

Key Concept: Directly or Indirectly

- The FCPA applies to things offered or given directly to government officials
- The FCPA also applies to things offered or given indirectly to government officials (such as through a third party or to a family member)
- “Willful blindness” is not an excuse
 - You may be guilty of a crime if you make or authorize a payment while consciously avoiding knowledge or deliberately ignoring that the payment may be used by a third party to pay a bribe

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"That's all I know, because it was at precisely that moment that I pulled the wool over my eyes."

Key Risk Area: Third-Party Relationships

Examples of Potential Red Flags in Third-Party Relationships

- 📄 Request to be paid in cash or offshore accounts
- 📄 Vaguely defined services
- 📄 Lack of supporting documentation for services performed
- 📄 Lack of business rationale for relationship
- 📄 Lack of relevant qualifications or experience for engagement
- 📄 Excessive commissions or consulting payments
- 📄 Close relationship to a government official
- 📄 Frequent government interaction
- 📄 Refusal to comply with reasonable diligence requests

Other Key Risk Areas

- **Gifts, travel, and entertainment**

- Small gifts as a token of appreciation or genuine advertising are usually ok
- Reasonable travel and entertainment for visits to company facilities, trainings, and product demonstrations are usually ok
- But the larger or more extravagant the gift or expenditure, the more likely it will be viewed as having an improper purpose and violating the FCPA

- **Donations and sponsorships**

- Can be used as a pretense for obtaining an improper business advantage from a government official
- Precautionary measures include due diligence on recipients, formal approval of expenditures, monitoring of recipients, and accurate recordkeeping, with reasonable detail

Other Key Risk Areas

- **Facilitation payments**

- Small sums of money paid to expedite the performance of certain routine non-discretionary governmental actions (such as police protection, mail, utilities, visa processing) are not prohibited under the FCPA – but are prohibited under the U.K. Bribery Act and many local laws

- **Mergers and acquisitions**

- Acquiring companies may be liable for the misconduct of acquired companies via successor liability
- But enforcement action under the FCPA is less likely if the acquirer conducts due diligence; remediates any misconduct; and integrates the acquired company into its compliance program

Penalties for FCPA Violations

- **Companies may face:**
 - Fines up to twice the gain from the bribe (which can be billions)
 - Administrative sanctions (e.g., ban from government contracts, loss of export privileges)
 - Years of compliance monitoring
- **Individuals may face:**
 - Imprisonment up to 5 years per violation
 - Fines of up to \$250,000 per violation or twice gross gain

Trends



Trends

- Larger financial penalties
- International coordination
- Interagency coordination
- Focus on Latin America
- Incentives for cooperation
- Focus on corporate compliance programs
- Collateral litigation

Trend: Larger Financial Penalties

Largest U.S. Monetary Sanctions By Entity Group

Odebrecht S.A.	\$ 3,557,626,137
The Goldman Sachs Group, Inc.	\$ 2,617,088,000
Airbus SE	\$ 2,091,978,881
Petroleo Brasileiro S.A. - Petrobras	\$ 1,786,673,797
Telefonaktiebolaget LM Ericsson	\$ 1,060,570,832
Telia Company AB	\$ 965,604,372
Mobile Telesystems Public Joint Stock Company	\$ 850,000,400
Siemens Aktiengesellschaft	\$ 800,002,000
VimpelCom Ltd	\$ 795,326,798
Alstom S.A.	\$ 772,291,200

Stanford Law School
Foreign Corrupt Practices Act Clearinghouse

<https://fcpa.stanford.edu/statistics-top-ten.html>

Trend: International Coordination

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Friday, January 31, 2020

Airbus Agrees to Pay over \$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case

The Department of Justice acknowledges and expresses its appreciation of the significant assistance provided by France's Parquet National Financier and the UK's Serious Fraud Office.

The department also appreciates the significant assistance provided by the U.S. Securities and Exchange Commission; the Board of Governors of the Federal Reserve System, including the Federal Reserve Bank of New York; the New York State Department of Financial Services, the United Kingdom Financial Conduct Authority; the United Kingdom Prudential Regulation Authority; the Attorney General's Chambers of Singapore; the Singapore Police Force-Commercial Affairs Division; the Monetary Authority of Singapore; the Office of the Attorney General and the Federal Office of Justice of Switzerland; the judicial investigating authority of the Grand Duchy of Luxembourg and the Criminal Investigation Department of the Grand-Ducal Police of Luxembourg; the Attorney General's Chambers of Malaysia; the Royal Malaysian Police; and the Malaysian Anti-Corruption Commission. The department also expresses its appreciation for the assistance provided by the Ministry of Justice of France; the Attorney General's Office of the Bailiwick of Guernsey and the Guernsey Economic Crime Division.

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Thursday, October 22, 2020

Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over \$2.9 Billion

Trend: Interagency Coordination



Administration Priorities

BRIEFING ROOM

Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest

JUNE 03, 2021 • PRESIDENTIAL ACTIONS

Sec. 3. Interagency Review. In accordance with this memorandum, the interagency review shall consider the recommendations of expert studies and shall include representatives from the following agencies and offices:

- (a) the Office of the Vice President;
- (b) the Department of State;
- (c) the Department of the Treasury;
- (d) the Department of Defense;
- (e) the Department of Justice;
- (f) the Department of Commerce;
- (g) the Department of Energy;
- (h) the Department of Homeland Security;
- (i) the Office of Management and Budget;
- (j) the United States Mission to the United Nations;
- (k) the Office of the Director of National Intelligence;
- (l) the Central Intelligence Agency;
- (m) the Office of the Chairman of the Joint Chiefs of Staff;
- (n) the United States Agency for International Development; and
- (o) the National Security Agency.

Trend: Focus on Latin America

Press Release

SEC Charges Amec Foster Wheeler Limited With FCPA Violations Related To Brazilian Bribery Scheme

FOR IMMEDIATE RELEASE
2021-112

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE Thursday, January 28, 2021

Businessman Sentenced for Foreign Bribery and Money Laundering Scheme Involving PetroEcuador Officials

Harris Targets Corruption, Immigration on Latin America Trip

With Kamala Harris visiting Guatemala and Mexico on her first foreign trip as vice president, the Biden administration is expected to announce new measures to fight smuggling and trafficking, and hopes to announce additional anti-corruption efforts.

By [Associated Press](#) | June 6, 2021, at 10:16 p.m.

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE Tuesday, March 23, 2021

Former Venezuelan Official Pleads Guilty in Connection with International Bribery and Money Laundering Scheme

Trend: Incentives for Cooperation

- Justice Department's FCPA Corporate Enforcement Policy, formally adopted in 2017, creates a presumption that a company will not be prosecuted, absent aggravating circumstances, if it:
 - Voluntarily discloses the misconduct
 - Fully cooperates with the government's investigation
 - Remediates any problems
- Under the policy, companies also may receive up to a 25% reduction in penalties if they cooperate and remediate but do not self-report

Trend: Focus on Corporate Compliance Programs

- In deciding how to treat a company under investigation, the Justice Department will evaluate the company's compliance program at the time of the offense and at the time of the decision
- The three “fundamental questions” are:
 - Is the corporation's compliance program well designed?
 - Is the program being applied earnestly and in good faith?
 - Does the corporation's compliance program work in practice?

**U.S. Department of Justice
Criminal Division
Evaluation of Corporate Compliance Programs
(Updated June 2020)**

Trend: Focus on Corporate Compliance Programs

- More specifically, authorities may ask both private and public companies about:
 - Policies and procedures to prevent and detect misconduct
 - Compliance training and continuing advice
 - Third-party relationship management
 - Internal reporting mechanisms
 - Internal investigation processes
 - Incentives and disciplinary measures
 - Remediation
 - Resources to audit, document, and analyze compliance efforts

Trend: Focus on Corporate Compliance Programs – Example

- Former Morgan Stanley employee was sentenced to **nine-months in prison and a return of profits** for his role in transferring a real estate interest to an official of a state-owned investment company in exchange for the official's help with business opportunities in Asia
- **Justice Department did not charge the company with a crime**, because it:
 - Maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from violating FCPA
 - Addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions, and employment
 - Frequently trained its employees on its internal policies and applicable laws
 - Regularly monitored transactions; randomly audited particular employees, transactions, and business units; and tested to identify illicit payments
 - Conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners

Trend: Collateral Litigation and Arbitration

- In addition to investigation costs, remediation costs, and any monetary sanctions imposed by enforcement authorities, companies and individuals that come under FCPA investigation now often also face collateral civil litigation and arbitration, including:
 - Shareholder derivative suits (e.g., breach of fiduciary duty, fraud, waste claims)
 - Securities class actions
 - RICO claims
 - Commercial contract disputes
 - Whistleblower/retaliation claims

Bribery Act 2010

- Came into force on 1 July 2011
- Provides for an offence of bribing another person, as well as being bribed
- Separate offence for bribery of foreign public officials
- Most significantly for companies, provided for an offence of failure by a commercial organisation to prevent bribery by its associated persons
 - However, a defence of having adequate procedures was also introduced
 - Guidance on adequate procedures identifies six principles: (i) proportionate procedures; (ii) top level commitment; (iii) risk assessment; (iv) due diligence; (v) communication and training; and (vi) monitoring and review
 - Since their introduction, the SFO has agreed 10 DPAs; a significant feature of an agreement for a DPA is the level of co-operation a Company has given

Comparison between US FCPA and the UK Bribery Act

US FCPA	UK Bribery Act
Companies held liable for corporate criminality, based on actions of employees.	Companies can be held liable for actions of employees, but identification principle provides a high threshold. However, the failure to prevent offence provides for corporate liability.
Books and records offences under the FCPA.	There are no equivalent accounting offences under the Bribery Act. However, UK companies do have to comply with the Companies Act 2006, with company officers liable for failure to keep adequate accounting records.
Facilitation payments are allowed.	There is no exemption for facilitation payments.
Broad jurisdictional and territorial reach.	Similarly broad jurisdictional and territorial reach, although listing on the London Stock Exchange alone is unlikely to be sufficient to be “carrying on business in the UK”.
Resolution by DPA is possible.	Resolution by DPA is possible.