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# **FOLLOWING THROUGH BOTH HERE AND ABROAD**

# Agenda

- Introductions
- Agenda
- United States Jurisdiction Abroad
- Foreign Corrupt Practices Act
- Open Forum

# **United States Jurisdiction Abroad**

# Five Bases of Jurisdiction

Territoriality

Nationality

Passive  
Personality


Protective  
Principle

Universality

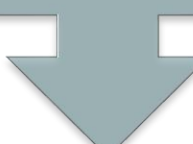
Note: Territoriality does not apply; the issue at question is when can the U.S. exercise jurisdiction abroad? Thus, we will focus on Bases 2 through 5.

# Asserting U.S. Jurisdiction Abroad

*Universality* recognizes that certain offenses are so heinous and so widely condemned that any state, if it captures the offender, may prosecute and punish that person on behalf of the world community, regardless of the nationality of the offender or the victim, or the location of the crime.



Based on *Universality*, the United States, and any other country, may assert jurisdiction over anyone committing a heinous crime, regardless of the location of the crime or nationality of offender or victim.



Examples of offenses covered by *Universality* base of jurisdiction include:

Piracy

Slave Trade

Terrorism

# Certain U.S. Laws Have Extraterritorial Effect

Examples of U.S. laws that have extraterritorial effect include, but are not limited to:

- The Foreign Corrupt Practices Act (dealing with bribery)
- The Export Administration Act of 1979 (dealing with boycotts),
- The Iranian Assets Control Regulations (dealing with the response to the 1980s Iran hostage crisis)
- The Civil Rights Act, the National Environmental Policy Act, and drug enforcement laws

# **Foreign Corrupt Practices Act (FCPA)**

# The Foreign Corrupt Practices Act

Bribery and corruption of government officials is a worldwide problem with enormous adverse economic and reputational effects.



# FCPA

1. A U.S. Statute passed in 1977 to prohibit bribery of non-U.S. government officials
2. Enforced by the U.S. Department of Justice and the U.S. Securities and Exchange Commission
3. Civil and criminal penalties for violations
4. FCPA allows facilitating payments. A facilitating payment is a certain type of payment to foreign officials which is not considered to be a bribe. It has to be a small amount and be paid not with the intent to bribe, but to speed up an administrative process where the outcome is already pre-determined and this payment will not alter the outcome. It also needs to be accounted for properly.

# Two Aspects of the FCPA:

- Anti-bribery
- Accounting
  - Books & Records
  - Internal Controls

# The Anti-Bribery Aspect of the FCPA:

- Prohibits giving or promising
  - payments or benefits
  - to a government official
  - to gain or retain business
- Prohibits improperly influencing an official to gain an advantage for the company

# The Accounting Aspect of the FCPA:

- No connection to bribery is required
- Requires company to:
  - book payments accurately
  - maintain effective internal and accounting controls

# The FCPA Provisions Apply to:

- U.S. citizens, nationals and residents
- U.S. corporations
  - Includes all issuers of securities on U.S. markets
- Employees and Agents of U.S. Corporations (including non-US persons)

# Government Official:

1. Government officials and employees
2. Political parties or party officials
3. Employees of designated international organizations such as UN, WHO
4. Includes full time and part time employees of government controlled entities
5. Covers relatives of officials

## Examples of Government Officials:

1. Nurses, doctors, pharmacists of government owned hospitals
2. Employees of government owned entities such as schools, formulary boards, health agency regulators, custom officials, professors at government owned universities, government safety inspectors, etc.

# Gain or Retain Business:

1. Win a contract
2. Obtain preferential customs treatment
3. Avoid or expedite necessary inspections and approvals
4. Alter the language in an administrative decree
5. Obtain government reports
6. Secure certifications, access to markets, reduce taxes or any other potential business advantage resulting from a violation of the FCPA.

AVOID THE APPEARANCE OF IMPROPRIETY, SUCH AS ANY ACTIONS THAT HAVE THE APPEARANCE OF “QUID PRO QUO” TO A GOVERNMENT OFFICIAL IN EXCHANGE FOR BUSINESS OR FAVORS

# Related Potential Consequences:

- Related U.S. criminal law provisions:
  - Aiding & Abetting and Conspiracy Liability
  - Money Laundering Liability
  - Travel Act Liability
- Cost and discipline of investigations and remedies
- Loss of reputation and loss of public trust



# Payments or Services to Government Officials Include:

- Many forms of payment:
  - monetary
  - invitations to congresses, conferences or special events
  - contractual payments
  - honoraria for speeches / advisory boards
  - gifts
  - charitable donations
  - favors

## Also Includes:

- Payments made by agents or third parties to government officials are subject to FCPA
- A company may be liable if it should have known that an improper payment will be made
- A company is expected to do appropriate due diligence

# Some Red Flags or Warning Signs:

1. Cash payment made to or requested by a government official
2. Payments for services that are not required
3. Payments for services to individuals or corporations not qualified to provide service
4. Donations to charities on government's officials behalf
5. Lack of contract or lack of clear obligations in a contract
6. Lack of proper documentation for expenses
7. Payments to bank accounts in countries other than where the work is performed
8. Payment for services priced higher than those of other competitors

# Recent Enforcement Activity

The United States government is focusing on the enforcement of the FCPA like never before; it is a “high priority”

- Larger penalties, both civil and criminal are being handed-down

## 2016

- **VimpelCom** - The Dutch-based telecommunications provider agreed to a \$795 million global settlement to resolve its violations of the FCPA to win business in Uzbekistan. (2/18/16) - \$397.6 million enforcement action against VimpelCom Ltd. and its Uzbek unit landed in the sixth spot on our list of the top ten FCPA cases of all time.
- **PTC** - The Massachusetts-based tech company and its Chinese subsidiaries agreed to pay more than \$28 million to settle FCPA cases involving bribery of Chinese government officials to win business. (2/16/16)
- **SciClone Pharmaceuticals** - The California-based pharmaceutical firm agreed to pay \$12 million to settle SEC charges that it violated the FCPA when international subsidiaries increased sales by making improper payments to health care professionals employed at state health institutions in China. (2/4/16)

# Recent Enforcement Activity

cont'd

- **Ignacio Cueto Plaza** - The airline executive agreed to pay a \$75,000 penalty to settle SEC charges that he violated the FCPA when he authorized improper payments to a third-party consultant who he knew could route portions of the money to union officials in the midst of a labor dispute. (2/4/16)
- **SAP SE** - The software manufacturer agreed to give up \$3.7 million in sales profits to settle SEC charges that it violated the FCPA when its deficient internal controls enabled an executive to pay bribes to procure business in Panama. (2/1/16)

## 2015

- **Bristol-Myers Squibb** - SEC charged the New York-based pharmaceutical company with violating the FCPA when employees of its China-based joint venture made improper payments to obtain sales. Bristol-Myers Squibb agreed to pay more than \$14 million to settle charges. (10/5/15)
- **Hitachi** - SEC charged the Tokyo-based conglomerate with violating the FCPA by inaccurately recording improper payments to South Africa's ruling political party in connection with contracts to build power plants. Hitachi agreed to pay \$19 million to settle charges. (9/28/15)

# Recent Enforcement Activity

cont'd

- **BNY Mellon** - SEC charged the global investment company with violating the FCPA by providing valuable student internships to family members of foreign government officials affiliated with a Middle Eastern sovereign wealth fund. BNY Mellon agreed to pay \$14.8 million to settle charges. (8/18/15)
- **Vicente E. Garcia** - SEC charged a former SAP SE executive with violating the FCPA by bribing Panamanian government officials through an intermediary to procure software license sales and receiving more than \$85,000 in kickbacks. Garcia agreed to settle the case and return the kickbacks plus interest. (8/12/15)
- **Mead Johnson Nutrition** – SEC charged the infant formula manufacturer with violating the FCPA when its Chinese subsidiary made improper payments to health care professionals to recommend the company's product to new and expectant mothers. Mead Johnson Nutrition agreed to pay \$12 million to settle the case. (7/28/15)
- **BHP Billiton** - SEC charged global resources company BHP Billiton with violating the FCPA when it sponsored the attendance of foreign government officials at the Summer Olympics. BHP Billiton agreed to pay a \$25 million penalty to settle the case. (5/20/15)

# Recent Enforcement Activity

cont'd

- **FLIR Systems** - SEC charged Oregon-based FLIR Systems with violating the FCPA by financing a "world tour" of personal travel for Middle East government officials who played key roles in decisions to purchase FLIR products. FLIR, which earned more than \$7 million in profits from such sales, agreed to pay \$9.5 million to settle the charges. (4/8/15)
- **Goodyear Tire & Rubber Company** - SEC charged Goodyear with violating the FCPA when its subsidiaries paid bribes to land tire sales in Kenya and Angola. The company agreed to pay \$16 million to settle the charges. (2/24/15)
- **Walid Hatoum/PBSJ Corporation** - SEC charged a former officer at a Tampa, Fla.-based engineering firm with violating the FCPA by offering and authorizing bribes and employment to foreign officials to secure Qatari government contracts. Hatoum agreed to settle the charges, and PBSJ entered into a deferred prosecution agreement and must pay \$3.4 million. (1/22/15)

# Top Ten FCPA Enforcement Actions

Here are the current top ten FCPA enforcement actions of all time:

1. Siemens (Germany) - \$800 million in 2008.
  2. Alstom (France) - \$772 million in 2014.
  3. KBR / Halliburton (USA) - \$579 million in 2009.
  4. BAE (UK) - \$400 million in 2010.
  5. Total SA (France) - \$398 million in 2013.
  6. VimpelCom (Holland) - \$397.6 million in 2016.
  7. Alcoa (U.S.) - \$384 million in 2014.
  8. Snamprogetti Netherlands B.V. / ENI S.p.A (Holland/Italy) - \$365 million in 2010.
  9. Technip SA (France) - \$338 million in 2010.
  10. JGC Corporation (Japan) - \$218.8 million in 2011.
- Eight companies in these top ten are non-U.S. firms.
  - The biggest FCPA enforcement action is still Siemens' \$800 million settlement from 2008.
  - The top ten cases involved financial penalties of \$4.65 billion, or an average of \$465 million.



# The Foreign Corrupt Practices Act

Since the passage of the Foreign Corrupt Practices Act (FCPA) in 1977, other nations passed laws to forbid bribery of foreign public officials in an effort to secure business abroad.

# Conclusion:

1. The failure to conduct due diligence can subject a company to liability under the FCPA
2. Even when you cannot clearly conclude that illegal payments were made, you can still be liable under the relevant recordkeeping and internal control requirements
3. You are liable for what your subsidiaries or third parties acting on your behalf do: the government may prosecute even in the absence of knowledge or direct participation of the parent company
4. Foreign officials may include even the relatively low level employee of state agencies and state owned institutions
5. With whistleblower laws and easier access of communications, there has been an increased number of calls coming from complainants outside of the USA
6. In addition to cash, the term payment can refer to benefits such as travel, entertainment, scholarships, gifts, stocks, favors
7. A promise to make payment is still a promise even if the attempt to fulfill the promise is not actually delivered
8. A “commonly used practice” that is illegal is still illegal