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Anti-Corruption Compliance and Internal Investigations: What Non-Attorneys Need to Know

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"What You Need to Know about Investigations Affecting Operations in the Oil and Gas Industry"

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Tracy LeRoy is a partner with Sidley Austin LLP. She focuses on litigation and dispute resolution for energy industry participants. She has recently handled cases related to renewable fuel commodities, agricultural commodities, drilling rights, leasehold disputes, and disputes over agreements surrounding the exploration, production, and transportation of oil and gas. Tracy also represents companies in the energy industry, and their officers and directors, in internal and independent investigations of corporate conduct, compliance, and reporting, including representing audit committees and special litigation committees in such matters.

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Introduction

"For decades the FCPA, which prohibits bribery of foreign government officials, was a sleepy statute, hardly enforced. That all started to change with the collapse of Enron in 2001 . . . . [As of May 2010,] the Justice Department has 150 open FCPA investigations."

Forbes, May 24, 2010

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Foreign Corrupt Practices Act

- FCPA first enacted in 1977, amended in 1988, 1998
- Criminalizes the bribery of foreign officials anywhere in the world where the purpose of the bribe is to influence an official decision in order to obtain or retain business
  - Primary violation: bribe or offer to bribe
  - Books and records/internal controls violations even if unrelated to bribe
- Jointly enforced by the U.S. Department of Justice and the U.S. Securities and Exchange Commission

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FCPA Enforcement Environment

- Top Priority of DOJ and SEC
  - Former Attorney General Eric Holder stated that the FCPA is "one of the highest priorities of the Department of Justice…The risk of heading to prison for bribery is real, from the boardroom to the warehouse." *(5-31-2010)*
  - DOJ Chief of Criminal Division, Leslie Caldwell: "The fight against international bribery has been, and continues to be, a core priority of the Department of Justice. . . Our record of success in these prosecutions has allowed us to show—rather than just tell—corporate executives that if they participate in a scheme to improperly influence a foreign official, they will personally risk the very real prospect of going to prison." *(11-19-14)*

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FCPA Enforcement Environment

- Special enforcement units at DOJ, SEC, and FBI
  - Dozens of dedicated lawyers and agents
  - SEC alone has more than 40 lawyers assigned to the FCPA unit
  - Collaboration between U.S. agencies and with foreign governments
- Use of traditional law enforcement tools
  - Search warrants
  - Sting operations
  - Electronic surveillance
  - Cooperators (*e.g.*, employees, competitors, other third parties)
  - Detention of suspects and material witnesses

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FCPA Enforcement Environment

- More prosecutions of individuals
  - "Let me be clear, prosecuting individuals is a cornerstone of our enforcement strategy…" *Attorney General Holder (5-31-10)*
- Investigations targeted on particular industries and actors
  - Competition disclosures
  - Specialized knowledge by law enforcement as to the nature of schemes in particular industries
  - Targeting of multinationals that are linked to the same third party bad actor
- Expansion of U.S. jurisdiction
  - DOJ and SEC aggressively pursuing expansive jurisdictional theories

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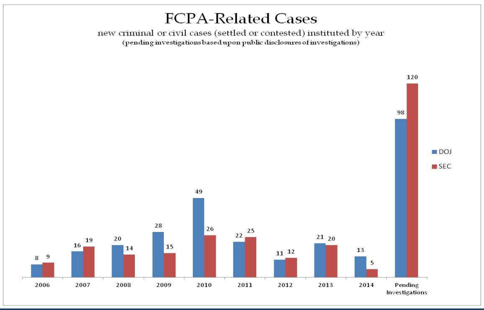
DOJ and SEC Investigations



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The Top Ten FCPA Settlements

No.	Company	Year	Amount (millions)
1	Siemens (Germany)	2008	$800*
2	KBR/Halliburton (U.S.)	2009	$579
3	BAE, plc (UK)	2010	$400
4	Total S.A. (France)	2013	$338
5	Alcoa (U.S.)	2014	$384
6	ENI SpA/Snamprogetti Netherlands B.V. (Italy/Holland)	2010	$365
7	Technip S.A. (France)	2010	$338
8	JGC Corporation (Japan)	2011	$218
9	Daimler AG (Germany)	2010	$185
10	Weatherford International (Switzerland)	2013	$152

* Siemens also paid fines totaling €596 million to German prosecutors in 2008 and 2007.

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Basic Elements of the FCPA

- A “covered” person/entity
- Must offer or give something of “value”
- To a “foreign official”
- To “obtain or retain business”
- With “knowledge” and “corrupt” intent
  - Note: Red flags could satisfy “knowledge” requirement

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Who is a "Covered" Person?

- **Issuers** of registered securities in the U.S. (includes non-U.S. companies who trade sponsored ADRs on U.S. stock exchanges)
- All **"domestic concerns"** meaning U.S. citizens, residents, companies, and foreign branches of U.S. companies
  - Officers, directors, employees, and agents of the above
- **Foreign companies or persons** who commit acts in furtherance of corrupt payments while in the U.S. or who cause others to do so

What is "Value"?

- Anything of "value" broadly construed
  - Cash and cash equivalent
  - Extravagant hosted travel, entertainment, non-monetary gifts, including illegal gifts such as narcotics or prostitutes
  - Other tangible or intangible benefit (*e.g.*, services, charitable or political donation)
  - Direct or indirect through intermediaries, such as consultants or distributors
  - Benefit to third persons with connection to government officials
- Offer or promise alone is sufficient
- No *de minimis* exception

Who is a "Foreign Official"?

"Foreign Official" is broadly defined:

- Any officer or employee of a government or any department, agency, or instrumentality of a government
- Any person acting in an official capacity on behalf of a government
- Any officer or employee of a company or business owned in whole or part by a government
- Any officer or employee of a public international organization such as the World Bank or the United Nations
- Any officer or employee of a political party or any person acting in an official capacity on behalf of a political party
- Any candidate for political office or political party officer
- Any individuals acting on behalf of such persons
- Spouses and other immediate family members of foreign officials must be treated as foreign officials

Is the Payment to “Obtain or Retain Business”?

- Payment made to obtain or retain business by:
  - Influencing any official act or decision
  - Inducing official to do or omit to do acts in violation of official duties
  - Securing any improper advantage
  - Inducing official to influence acts of government
- Need not relate to specific business opportunity
- Business need not be with a foreign government
- Bribes with any “business nexus” such as to reduce foreign duties/taxes or resolve disputes can violate FCPA

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Is There a “Corrupt” Intent?

- Was the benefit conferred or offered to induce foreign official to abuse or misuse his/her position or authority through action or inaction?
- Corrupt intent can be shown by circumstantial evidence
  - Gift/payment made with reasonable expectations of some official favor in return
  - *Quid pro quo* is generally assumed
  - *Quid pro* quo need not be completed
  - Official need not be able to deliver *“quo”* himself
- Government need not establish defendant knew his/her conduct violated FCPA

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“Knowledge” Standard

“Knowing” means:

- Actual awareness
- Firm belief that the offer or payment is substantially certain to occur
- Reasonable person would have realized that an illicit payment was probable unless the person actually believes that the payment did not happen
- Negligence not enough but “willful blindness” is (*i.e.*, conscious disregard or deliberate ignorance of known circumstances that should alert one to FCPA violations)

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"Knowledge" Standard

"Knowing" means:

- Directly or Indirectly: Payment or offers to pay any person while knowing all or portion of value will be given, directly or indirectly, to any foreign official are prohibited
  - Companies can be held responsible for the improper conduct of their agents, consultants, distributors and joint venture partners
- This standard requires follow-up on Red Flags (a red flag could create a presumption of corrupt activity)

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Red Flags

- "Red flags" are warning signs or characteristics that raise concerns about potential involvement in corrupt activity.
- Red flags can arise in various contexts:
  - Doing business in a country with a low CPI index
  - Third parties
  - Interactions with government officials
  - Charitable contributions
  - Books and records

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Red Flags

- Business Gifts / Hospitality
  - Any expenditure that is
    - not clearly reasonable in nature or amount **or**
    - not obviously *bona fide* **or**
    - not directly related to (i) the promotion or explanation of the products or (ii) the performance of a contract
  - Gifts worth more than a nominal amount
  - Gifts of tickets to sporting, entertainment, or social events not attended by company personnel
  - Meals or entertainment that are (or could be seen as) lavish or excessive under local customs
  - Site visits or training trips for customers with side trips, stopovers, or extended stays

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Travel, Meals, Entertainment and Gifts

- The FCPA allows travel, meals, entertainment, and gifts to be given to foreign officials if they are
  - "reasonable and bona fide" and directly related to "the promotion, demonstration, or explanation of products or services" or the performance of a contract
- DOJ and SEC have aggressively pursued companies for providing *excessive* travel, meals, entertainment and gifts to foreign officials
  - *FLIR Int'l* employees only recently settled charges relating to travel by Saudi officials ostensibly for purposes of visiting FLIR's facility, but that also consisted of visits to popular tourist destinations

Red Flags

- Third Parties
  - History of corruption in country
  - Use of agents, consultants, or distributors with inadequate qualifications or experience
  - Payments, commissions, or discounts at greater than market rates
  - Invoices for usual, vaguely-described, or inadequately-documented expenses
  - Requests for payments to a country different from the third party's country
  - Refusals to cooperate with due diligence, enter a contract with FCPA clauses, complete FCPA training, or certify FCPA compliance

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Red Flags

- If present, company is on notice to follow-up, review and address the red flag issue
  - Follow-up and resulting action should be fully documented
  - Appropriate follow-up will help forestall expansion of future inquiries involving similar red flag activities
- Integrated compliance: Information on identified red flags should be regularly shared with compliance
  - Allows for early identification of potential replication in other parts of the company
  - Provides opportunities to supplement or focus current compliance practices on actual risks

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Response to Red Flags

- In current environment, it is critical to respond appropriately to all "red flags"
  - Companies can be liable for any bribes paid by third parties after they acquire "knowledge" the third party is paying bribes
  - Individuals can similarly be liable if they have "knowledge" that bribes are being paid
- Standard for "knowledge" under FCPA is less than clear
  - It includes at least awareness of a "high probability" that misconduct is occurring
  - As a practical matter, DOJ and SEC often presume that "knowledge" exists if a company sees a "red flag" but does not follow up

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FCPA Risk Areas

- Any foreign company with contacts to the U.S. or doing business with a U.S. company overseas has some FCPA risk
- The risks arise from business practices that involve direct or indirect interactions with foreign government officials (*e.g.*, government approvals/involvement required for business operation)

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Risks Arising from Third Parties

- Companies commonly held responsible for the improper conduct of third parties acting on their behalf
  - FCPA prohibits payments to a third party if the covered person authorizes, knows, or tacitly approves the improper actions
  - "Firm belief," awareness of a "high probability," and deliberate ignorance are all treated as "knowledge"
- These third parties could include, among others:
  - Agents
  - Distributors/Resellers
  - Consultants/Lobbyists/Marketing
  - M&A and joint venture partners
  - Contractor/subcontractors
  - Vendors

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FCPA Penalties - Bribery

- Entities:
  - Criminal fine up to $2 million per violation
  - Civil fine up to $11,000 per violation
  - Disgorgement of any ill-gotten gains
- Individuals:
  - Criminal fine up to $250,000 per violation
  - Prison up to 5 years
  - Civil fine up $11,000 per violation
  - Disgorgement of any ill-gotten gains
- A court could levy fines based upon twice the gross gain or loss from the illegal activity, if higher than the above fines

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Potential Collateral Consequences

- Suspension or debarment from government contracting
- Denial of export licenses
- Securities disclosure and shareholder litigation
- Civil litigation by competitors
- Negative publicity

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Internal Investigations 101

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Who Handles an Investigation?

- Special Committee of the Board of Directors
- In-house counsel, compliance officers, risk management
- Outside counsel
- Outside consultants (accountants or analysts)

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Document Collection: What to Expect

- Litigation holds
- Document collection interviews/checklists
- Protection of electronic data
- Protection of hard copy data
- Protection of hardware
- Duration

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Work Product Doctrine

- Texas Rule of Civil Procedure 192.5: “material prepared or mental impressions developed in anticipation of litigation by a party or a party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.”

- Must be a “substantial chance of litigation” meaning “more than an abstract possibility or unwarranted fear” of litigation and the work must actually be conducted for the purpose of preparing for litigation and not for some other purposes. In re Maher, 143 S.W.3d 907, 912 (Tex. App. – Fort Worth 2004, orig. proceeding).

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Attorney-Client Privilege

- The Subject Matter Test (majority position)
  - The communication must be made for legal advice
  - The employee making the communication must have done so at the direction of a superior
  - The superior made the request so that the corporation could secure legal advice
  - The subject matter of the communication is within the scope of the employee's duties; and
  - The communication is not disseminated beyond those persons who need to know its contents. *See Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 197-8 (Tex. 1993).
- Followed in all federal courts and a majority of state courts (including Texas and New York)

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Witness Interviews: *Upjohn Co. v. United States* (1981)

1. Communications made by employees
2. Communications made to counsel
3. Communications made at request of superiors
4. Communications concerned employee's duties
5. Communications were to obtain information unavailable from upper management
6. Communications made to secure legal advice
7. Employees aware that purpose of investigation was to obtain legal advice

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Witness Interviews: *Upjohn* Warnings

American Bar Association's White Collar Crime Committee Working Group suggests:

- I am a lawyer for Corporation A. I represent only Corporation A, and I do not represent you personally.
- I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.
- Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.
- In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss this discussion.
- Do you have any questions? Are you willing to proceed?

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Witness Interviews

- Confidentiality agreements
- Refusal to cooperate: protected activity?
- The company's counsel cannot advise the employee on the employee's decision to retain counsel
- When the employee wants his or her counsel to attend the interview
- Use of information learned in a witness interview for disciplinary actions

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The End Result: Investigation Report

- Reports from internal investigations can be privileged and work product:
  - Investigation conducted at direction of counsel for the purpose of providing legal advice
  - Interviewees were told purpose was to assist counsel in rendering legal advice
  - Report and interviews were not shared with third parties
- But see *Chevron Midstream Pipelines v. Settoon Towing*, 2015 WL 65357 (E.D. La. Jan. 5, 2015) (root cause analysis of maritime accident not privileged even though initiated by in-house counsel).

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Disclosure of the Privileged Report

- The Government: latest DOJ directive indicates that a subject corporation need not disclose, and prosecutors may not request the disclosure of, non-factual or core attorney work product.
  - But to earn credit for cooperating, corporation must disclose factual information, including facts learned in interviews, unless that information has been otherwise provided.
- Shareholders: *Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Trust Fund* (Del. 2014).
- What about employees whose acts are detailed in the report? *Writt v. Shell Oil Co.* (Tex. 2015).

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Thank you!

Questions?

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