

A Risk-Based Approach to Managing FCPA Compliance in the Supply Chain

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What this presentation will cover?

- Overview
- Basic review of the laws and contractual goals of the FCPA
- Risk assessment of compliance issues when dealing with a new supplier
- FCPA Compliance contracting terms and conditions

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Foreign Corrupt Practices Act

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Foreign Corrupt Practices Act of 1977

- FCPA has two parts
 - **Anti-Bribery Provisions** – criminalize the conduct of making bribes (or offers to make) to non-U.S. governmental officials whether made directly or through a third party
 - **Books and Records and Internal Controls Provisions** –companies required to maintain accurate books and records and adequate accounting and financial controls
- A company may be liable for the actions of a third party acting on its behalf (vendors, supply chain partners such as freight forwarders, visa processors, accountants, lawyers, etc.)
- Joint Jurisdiction – U.S. Department of Justice (bribery & corruption-criminal) and the U.S. Securities and Exchange Commission (books and records-civil)

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International Anticorruption Initiatives

- Other countries have adopted statutes similar to the FCPA
 - OECD Convention
 - Council of Europe Criminal Law Convention on Corruption
 - UK Bribery Act 2010 (Pending in House of Commons)
 - The African Union Convention
 - UN Convention Against Corruption
- Nearly every country has a domestic antibribery statute
- Many governments have their own rules on accepting gifts, travel or entertainment. UK Bribery Bill

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FCPA Anti-Bribery Provisions

Five Basic Elements of the Anti-bribery Provisions

1. Anyone
2. Who, with corrupt intent
3. Makes a payment or gives something of value
4. To a non-U.S. governmental official
 - directly or
 - indirectly while knowing (*or should knowing*) that it will go to a non-U.S. governmental official
5. That *might* assist in obtaining or retaining business...

Has violated the FCPA

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Vendor Violations Lead to Company FCPA Penalties

- Vetco Gray paid \$26MM fine for violations by its freight forwarder Panalpina
- Aibel Group Ltd. entered into a 3 year Deferred Prosecution Agreement (DPA) for the Vetco Gray conduct

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The Anti-Bribery Provision Exception for Facilitating Payments

- There are exceptions under very specific and extremely limited circumstances for “facilitating” or “expediting” payments
 - Made to ensure or speed the proper performance of a foreign official’s duties
 - The duties must be essentially clerical and must not require the official to use any discretion or judgment
- To fall under the exception, the payments must be for small amounts (but there is no magic number)
- Many local laws (and FCPA policies) forbid facilitating payments
- These payments **MUST** be recorded properly
- Some countries, with laws similar to the FCPA, do not allow facilitating payments

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The Anti-Bribery Provision Exception for Gifts and Entertainment

- There are exceptions under very specific and extremely limited circumstances for gifts and entertainment under the FCPA (*15 U.S.C. § 78dd-1(c)(2)(A)-(B)*)
 - Must be a reasonable and bona fide expenditure
 - Must be directly related to one or more of the following:
 - the promotion, demonstration, or explanation of products or services; or...the execution or performance of a contract with a foreign government or agency thereof.
- These payments **MUST** be recorded properly

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Risk Based Compliance

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ALM Approach

- Anti-Money Laundering Approach, which includes review of the following factors:
 - **Geography**
 - **Nexus to Governmental Officials**
 - **Business Type**
 - **Method of Payment**
 - **Dollar Volume of Business**

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FSA Approach

- UK Financial Services Authority settlement with insurer AON suggested an approach with reference to an “*internationally accepted corruption perceptions index*”

- **Transparency International-Corruption Perceptions Index (CPI)**

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TOP TEN COUNTRIES

Rank	Country	Index							
		2009 ^[15]	2008 ^[1]	2007 ^[17]	2006 ^[1]	2005 ^[1]	2004 ^[2]	2003	2002
1	<u>New Zealand</u>	9.4	9.3	9.4	9.6	9.6	9.5	9.5	9.4
2	<u>Denmark</u>	9.3	9.3	9.4	9.5	9.5	9.5	9.5	9.5
3	<u>Singapore</u>	9.2	9.2	9.3	9.2	9.3	9.4	9.4	9.4
3	<u>Sweden</u>	9.2	9.3	9.3	9.2	9.2	9.3	9.3	9.0
5	<u>Switzerland</u>	9.0	9.0	9.0	9.1	9.1	8.8	8.5	8.4
6	<u>Finland</u>	8.9	9.0	9.4	9.6	9.6	9.7	9.7	9.9
6	<u>Netherlands</u>	8.9	8.9	9.0	8.7	8.6	8.9	9.0	8.8
8	<u>Australia</u>	8.7	8.7	8.6	8.7	8.8	8.8	8.6	8.5
8	<u>Canada</u>	8.7	8.7	8.7	8.5	8.4	8.7	9.0	8.9
8	<u>Iceland</u>	8.7	8.9	9.2	9.6	9.7	9.6	9.4	9.2
11	<u>Norway</u>	8.6	7.9	8.7	8.8	8.9	8.8	8.5	8.6

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DOJ APPROACH

- DOJ Release Opinion 08-02, regarding proposed Halliburton acquisition of Expro, discussed a risk-based approach which would organize due diligence efforts into the following categories:
 - **High Risk**
 - **Medium Risk**
 - **Low Risk**

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Suggested Approach

- Incorporates portions of all three approaches to produce the following categories:
 - **High Risk Suppliers**
 - **Low Risk Suppliers**
 - **Nominal Risk Suppliers**
 - **Suppliers of General Goods and Products**

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High Risk Suppliers

- Presents one or more of the following factors:
 1. It is based in or supplies goods/services from a high risk country;
 2. It has a reputation in the business community for questionable business practices or ethics; or
 3. It has been convicted of, or is alleged to have been involved in, illegal conduct and has failed to undertake effective remedial actions.

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Low Risk Suppliers

- A Low Risk Supplier is an individual or entity located in a Low Risk Country which:
 1. Supplies goods or services in a Low-Risk Country;
 2. Is based in a low risk country where the goods or services are delivered, it has no involvement with any foreign government, government entity, or Government Official; or
 3. Is subject to the US FCPA and/or Sarbanes-Oxley compliance.

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Nominal Risk Suppliers

- A Nominal Risk Supplier is an individual or entity which:
 1. Supplies goods or services which are non-specific;
 2. For any particular job or assignment ; and
 3. The value of each transaction is less than \$10,000.

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Suppliers of General Goods and Services

- A Supplier of General Goods and Products is an individual or entity which:
 1. Supplies goods or services which are widely available to the public and
 2. Do not fall under the definition of Minimal Risk Supplier.
 3. Examples: Transportation; food service vendors and educational service providers.

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Goals for Drafting FCPA Compliance Provisions into Vendor Agreement

- Company's Supplier Agreement
 - Implement elements of Company's FCPA compliance program
 - Restriction on facilitation payments
 - Bi or Tri-ennial Re-qualification
 - Indemnification
 - Make a FCPA violation a material breach of contract
 - Require proper accounting and invoicing
 - Permit audits
 - Ability to withhold payment whenever FCPA compliance issues arise
 - Require full cooperation with investigations
 - Place appropriate restrictions on any sub-vendors and require similar contractual terms
 - Consider non-U.S. anti-bribery / anti-corruption laws
 - Require acknowledgement of FCPA requirements
 - Require training and annual certification

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Questions?



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