

ANTI-Corruption and ANTI-Bribery Compliance

Multi-National Counsel Boot Camp:
Practical Solutions for International Lawyers
Compliance and Sanctions, Part I: An Overview

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Outline of Discussion

- Overview of Anti-Corruption and Anti-Bribery Laws
- Major risk areas and concerns
- Implementing effective compliance programs
- Recent government actions and trends

Global Anti-corruption Standard

- A number of countries around the world have enacted anticorruption laws
 - E.g., United Kingdom, Brazil, Russia, India, China
 - 40 countries have also signed the OECD Anti-Bribery Convention
- Policies and procedures can help company mitigate liability
- Regulators will assess P & P
 - Tailored to business
 - Designed to address risks
 - Comprehensive
 - Implemented effectively and in good faith
 - Tested regularly (at least annually)
 - Ultimately, whether it works

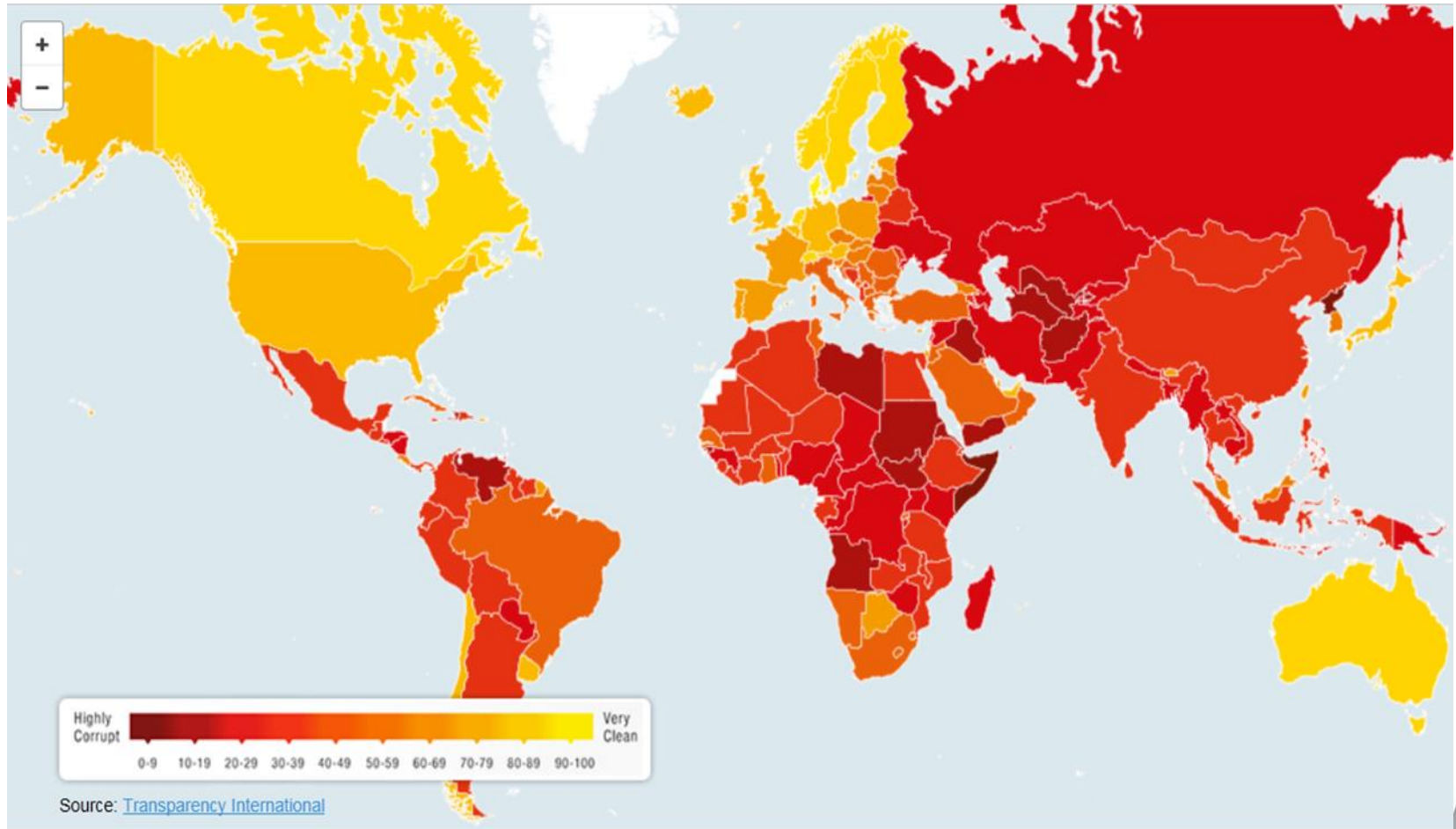
INTERNATIONAL COMPARISONS

	FCPA	UK Act	China Laws	Brazil
Limited to Foreign Officials	Yes	No	No	Yes
Private Bribery	No	Yes	Yes	No
Offer/Receipt	Offer only	Both	Both	Both
Failure to Stop 3 rd Parties	Vicarious Liability	Strict Liability	Unknown	Strict Liability
Requisite Intent	Corrupt Intent	Foreign Officials = No	Improper Benefit	Strict Liability
Facilitation Payments	Exempted	No Exception	No Exception	No Exception
Promotional Costs	Reasonable costs	No defense	No defense	No defense

COMPARISONS (cont'd)

	FCPA	UK Act	China Laws	Brazil
Books and Records	Yes	No	No	Yes
Robust Compliance	No Defense	Yes	No Defense	Yes
Individual Penalties	\$250k / violation 5 years prison	Up to 10 years prison & Unlimited fines	Private: 3 to 10 years prison Official: fines, prison, death	Up to 12 years prison and fines
Company Penalties	\$2M / violation	Unlimited fine	Fines, asset confiscation, or licenses revoked	Up to 20% of gross revenue, assets seized, dissolution

TRANSPARENCY INTERNATIONAL GLOBAL CORRUPTION INDEX



Foreign corrupt practices act (FCPA)

Anti-Bribery Provisions:

- Cannot provide anything “of value” to “foreign (non-U.S.) officials” for “improper purposes”

Accounting Standards and Internal Controls

- Must keep “books, records and accounts, which, in reasonable detail, accurately and fairly reflect” transactions
- Maintain internal accounting controls

Covers “All U.S. Persons”

- Public company issuers and their officers, directors, employees, agents, and shareholders acting on their behalf
- Non-public domestic concerns and their officers, directors, employees, agents, and shareholders acting on their behalf
- Certain persons and entities acting while in U.S. territory

Civil and criminal penalties

- Companies and individuals

Anti-Bribery Basics

- Cannot offer/make bribes
- To foreign officials
 - Including low ranking employees and high-level officials of foreign government instrumentalities
- With intent to induce/influence official to use position to help get or retain business
- “Facts and circumstances” analysis

Major Risk Areas

- Global risk: compliance with foreign anti-corruption laws
- Insufficient internal controls
- M&A transactions – successor liability
- Intermediaries & third parties
- Gifts, meals, and entertainment

Meeting the Global Standard

CORE COMPONENTS OF AN EFFECTIVE COMPLIANCE PROGRAM

- Support and commitment from the top.
- A clearly articulated and visible corporate policy.
- Making compliance the duty of individuals at all levels of the company.
- Oversight by the senior corporate officers with autonomy, resources and authority.
- Generally applicable compliance measures focused on high-risk areas.
- Ensuring the compliance of third parties.
- Financial and accounting procedures, including a system of internal controls.
- Periodic communication and documented training.
- Encouragement and positive support for compliance.
- Appropriate disciplinary procedures to address violations.
- Guidance, advice, confidential reporting and whistleblower protections.
- Periodic reviews.

Expanding Internal Controls Provision

- The FCPA require issuers to adopt accounting controls that “provide **reasonable assurances** that . . . transactions are executed in accordance with management’s authorization.”
- Enforcement agencies have interpreted this to require that companies adopt robust anti-corruption compliance programs
- Recent enforcement actions by the SEC have focused on the requirement that companies adopt internal controls sufficient to “**prevent and detect**” violations of the books and records provisions of the FCPA.
 - 1/10/2014 – Archer Daniels Midland Co. \$54 million settlement
 - 2/25/2015 – Goodyear \$16 million settlement

M&A Transactions

- Successor inherits FCPA liability of the acquired company
 - In a recent advisory opinion, the DOJ affirmed no successor liability if the target company's pre-acquisition conduct had no nexus to the U.S.
 - "Successor liability does not create liability where none existed before."
- Additional focus on post-acquisition continuation of unlawful conduct
- Recommended action to acquiring companies:
 - Due diligence & disclosure of irregularities
 - Integrate acquired company in compliance program

Limiting Third Party Liability

- Standard: Can be liable for payments made to third parties if know, or are willfully blind to fact, that third party is or will be making unlawful payments
 - Awareness of a high probability can be enough
- Guiding principles: Due Diligence
 - Determine third party's qualifications & associations
 - Understand business rationale for including third party in transaction
 - Ongoing monitoring of third party relationships
 - Third party training
 - Regular FCPA compliance certifications
 - Ensure payments at market rates

Gifts/Payments to Foreign Officials

- Impermissible: payments made “to assist...in obtaining or retaining business”
- Likely permissible:
 - Items of nominal value (coffee, taxi, promo items)
 - Gifts, must be
 - Given openly and transparently
 - Properly recorded in “reasonable detail”
 - Provided “only” to reflect esteem/gratitude
 - Ok under local law
- Permissible
 - Legitimate charitable contributions
 - Facilitating payments

Recent Enforcement Trends

- Fewer enforcement actions, but larger fines
 - In 2010, 74 enforcement actions
 - 48 by the DOJ and 26 by the SEC
 - Contrast with 2014, 26 enforcement actions
 - 17 by the DOJ and 9 by the SEC
 - Average fine:
 - \$34 million in 2012 but \$156.6 million in 2014
 - \$772 million fine against Alstom, S.A.
 - \$135 million fine against Avon Products
- The emergence of whistleblowers

The Emergence of Whistleblowers



Whistleblower Bounty Program

- Under Dodd-Frank, the SEC pays bounties to those reporting certain violations
 - Award of at least 10% but not more than 30% of monetary award in excess of \$1 million
- In 2014, 159 (4.4%) out of 3,620 whistleblower tips related to FCPA
 - Over 40% tipsters are current or former employees
 - 20% were contractors or consultants
- Growing number of tips on FCPA
 - 2014 - 159
 - 2013 - 149
 - 2012 - 115

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