



UNDERSTANDING THE FCPA: RECENT TRENDS AND CONSIDERATIONS

PRESENTED BY:

ALI RAMPURAWALA, MANAGER

MUMTA TANEJA, MANAGER

AGENDA

-  Overview of Foreign Corrupt Practices Act ("FCPA")
-  Recent Trends in Enforcement Actions
-  Red Flags
-  Compliance Methodologies and Frameworks
-  Common pitfalls and considerations

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OVERVIEW OF THE FCPA



HOW DID IT START?

- Foreign Corrupt Practices Act was enacted in 1977 after over 400 U.S. companies admitted to making questionable or illegal payments in excess of \$300 million to foreign government officials, politicians, and political parties
- Prohibits making improper payments to foreign government or officials
- Jointly enforced by the U.S Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC")

KEY ELEMENTS

Two Primary Provisions:

1. Anti-Bribery



- Prohibit offering or giving anything of value to a foreign official or political candidate, directly or indirectly, to obtain or retain business.
- *Foreign Official* - Any officer or employee of a foreign government or any department agency or instrumentality thereof, or of a public international organization, or any person acting in an official capacity or on behalf of any such government, department, agency or instrumentality or for, or on behalf of any such public international organization.

2. (a) Books & Records and (b) Internal Controls



- Require that companies maintain proper internal books and records that reasonably reflect all transactions and dispositions of assets.
- Mandate internal accounting controls to assure that expenditures are authorized

PROHIBITED PAYMENTS

1

The FCPA prohibits not only actual payments, but also any offer, promise, or authorization of the provision of anything of value.

- No payment needs to be made nor benefit bestowed for liability to attach.
- An offer to make a prohibited payment or gift, even if rejected, is a violation of the FCPA.

2

The FCPA also prohibits indirect corrupt payments.

- The FCPA imposes liability if a U.S. company authorizes a payment to a third party while “knowing” that the third party will make a corrupt payment.
- Third parties include local agents, consultants, attorneys, subsidiaries, etc.

3

Political or Charitable contributions can violate the FCPA.

PERMISSIBLE PAYMENTS

1 **Small payment to low-level foreign officials that serve only to expedite or secure “routine governmental action.”**

- Can include securing basic services such as telephone, water and mail, processing visas, obtaining permits
- Must be reasonable, well-documented and appropriately recorded
- Sometimes referred to as “Grease Payments”

2 **Payments permitted by local law**

- Be aware that all local laws prohibit bribery
- Local law defense has never been applied in US courts

3 **“Reasonable and bona fide” business expense payments to foreign officials.**

WHO DOES IT APPLY TO?



Issuers

Any company whose securities are registered in the U.S. or that is required to file periodic reports with the SEC.

- Applies to stockholders, officers, directors, employees, and agents acting on behalf of the issuer.
- Issuers must adhere to both the FCPA's Anti-Bribery and Accounting Provisions.

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Domestic Concerns

Any individual who is a U.S. citizen, national, or resident of the United States, or any business organization that has its principal place of business in the U.S or which is organized in the U.S.

- Applies to stockholders, officers, directors, employees, and agents acting on behalf of the domestic concern.
- "Domestic Concerns" must adhere to the FCPA's **Anti-Bribery Provision** NTAC:4UC-11



Other Persons

Anyone who takes any act in furtherance of a corrupt payment while within the territory of the U.S.

CRIMINAL PENALTIES & FINES

1. Anti-Bribery:



Individuals

Fines up to \$250,000 per violation and imprisonment up to five years

Entities

Fines up to \$2,000,000 per violation (or more under alternative fine rules) and disgorgement of resulting profits

2. Books and records:



Individuals

Fines up to \$5,000,000 per violation and imprisonment up to 20 years

Entities

Fines up to \$25,000,000 per violation (or more under alternative fine rules)

CIVIL PENALTIES & FINES

1. Anti-Bribery:

- ***Officers, directors, employees, and agents***
 - Fines up to **\$10,000** per violation for any willful act
- ***Entities***
 - Fines up to **\$10,000** per violation and injunction
 - The SEC may seek disgorgement of profits resulting from illegal activity
 - Possible denial of export licenses and other tax consequences



LARGEST FCPA ENFORCEMENT PENALTIES

#	Company	Total Resolution	DOJ Component	SEC Component	Date
1	Siemens AG	\$800,000,000	\$450,000,000	\$350,000,000	12/15/2008
2	Alstom S.A.	\$772,290,000	\$772,290,000	—	12/22/2014
3	KBR/Halliburton	\$579,000,000	\$402,000,000	\$177,000,000	02/11/2009
4	Teva	\$519,000,000	\$283,000,000	\$236,000,000	12/22/2016
5	Braskem/Odebrecht	\$419,800,000	\$354,800,000	\$65,000,000	12/21/2016
6	Och-Ziff	\$412,000,000	\$213,000,000	\$199,000,000	09/29/2016
7	BAE Systems*	\$400,000,000	\$400,000,000	—	02/04/2010
8	Total S.A.	\$398,200,000	\$245,200,000	\$153,000,000	05/29/2013
9	VimpelCom	\$397,600,000	\$230,100,000	\$167,500,000	02/18/2016
10	Alcoa	\$384,000,000	\$223,000,000	\$161,000,000	01/09/2014

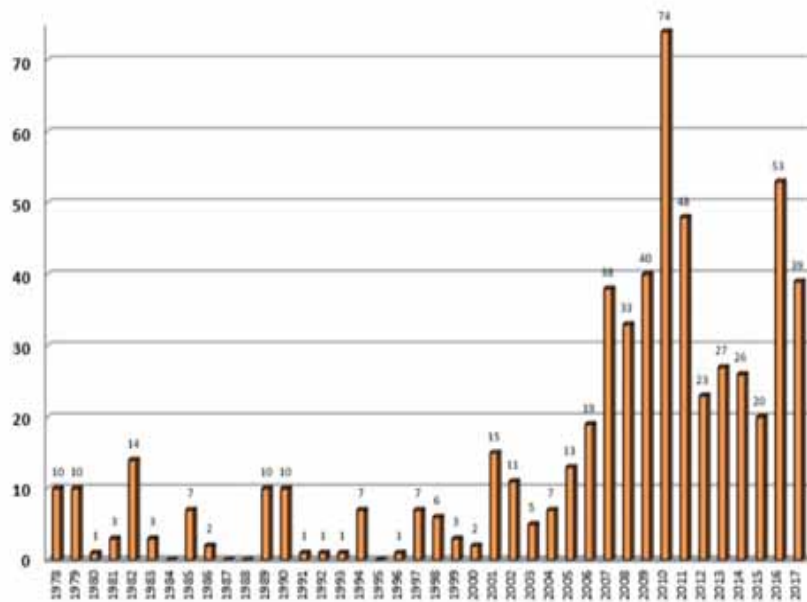
Update: In 2017, Telia Company AB agreed to pay a combined penalty of \$965 million for corrupt payments made in Uzbekistan and Keppel Offshore was assessed \$422 million in penalties

RECENT TRENDS IN ENFORCEMENT ACTIONS

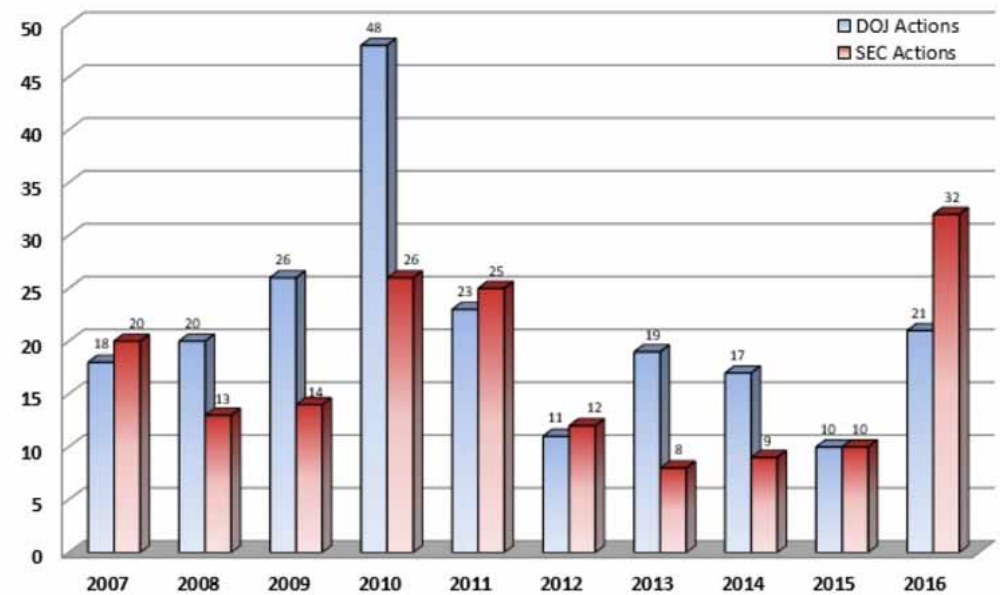


INCREASE IN ENFORCEMENT ACTIONS

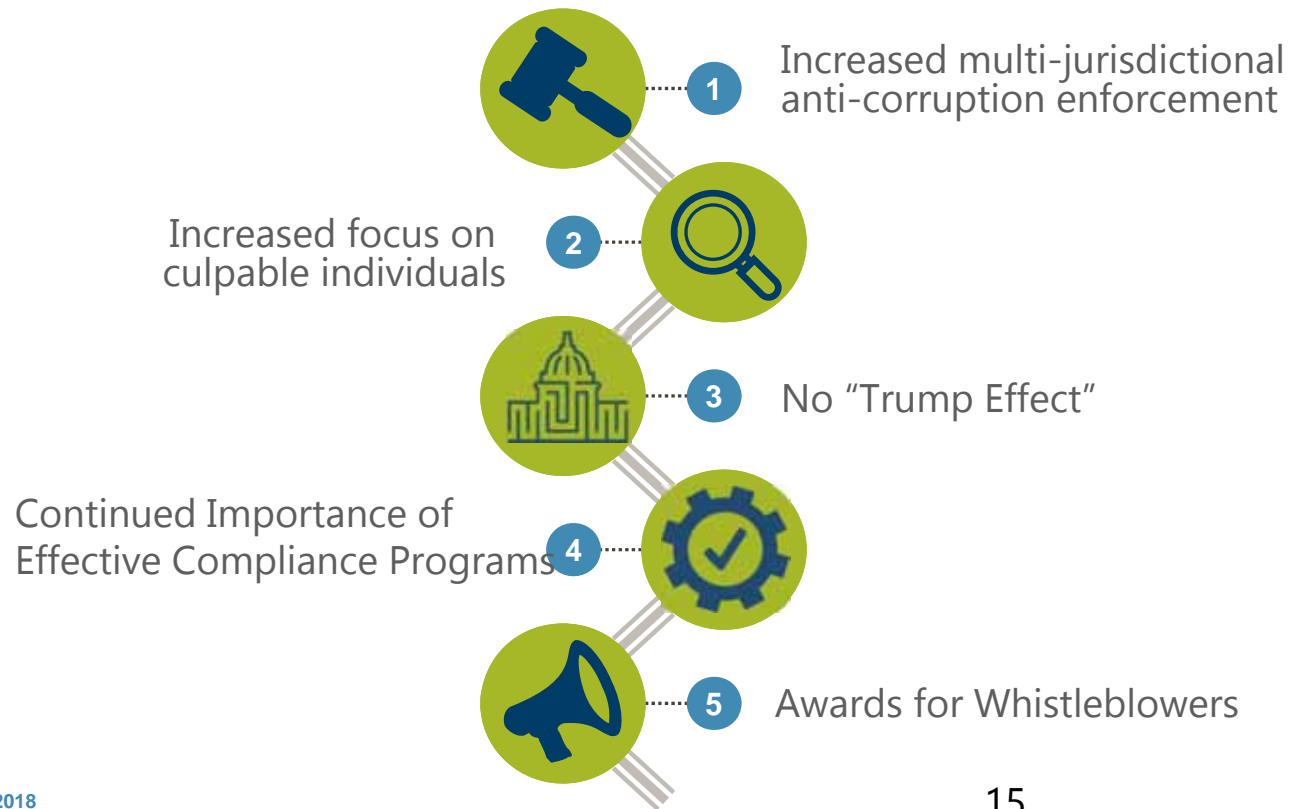
Combined DOJ/SEC FCPA Enforcement Actions Per Year (1978-2017)



Number of FCPA Enforcement Actions Per Year



TOP TRENDS BASED ON 2017 ACTIONS



MULTI-JURISDICTIONAL ANTI-CORRUPTION ENFORCEMENT

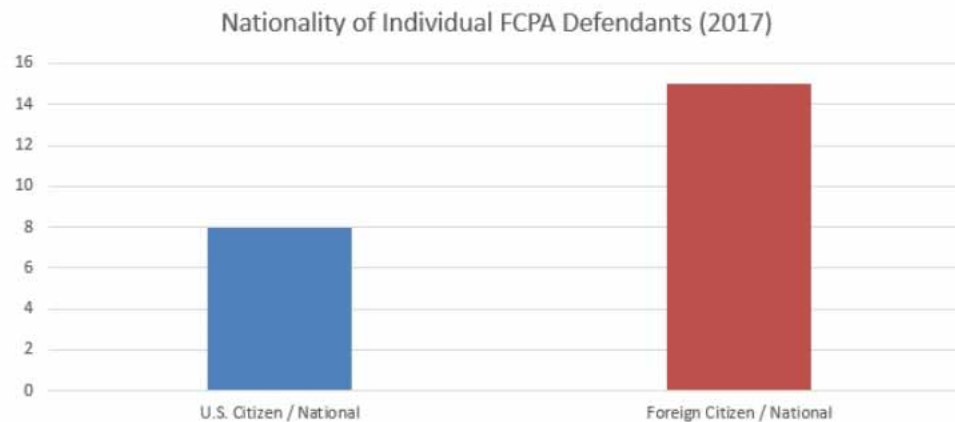
Multi-National Anti-Corruption Enforcement Actions – 2016 & 2017

Company	Total Resolution	U.S. Portion	Other Countries Involved – Payments	
Keppel Offshore & Marine (Dec. 2017)	\$ 422,216,980	\$ 105,554,245 (DOJ)	Brazil (Ministério Público Federal) Singapore (Atty. Gen.'s Chambers)	\$ 211,108,490 \$ 105,554,245
SBM Offshore (Nov. 2017)	\$ 820,000,000	\$ 238,000,000 (DOJ)	Brazil (Ministério Público Federal) Netherlands (Openbaar Ministerie)	\$ 342,000,000 \$ 240,000,000
Telia (Sep. 2017)	\$ 965,773,949	\$ 483,273,949 (DOJ / SEC)	Netherlands (Openbaar Ministerie) Sweden (Åklagarmyndigheten)	\$ 274,000,000 \$ 208,500,000
Rolls-Royce (Jan. 2017)	\$ 800,305,272	\$ 169,917,710 (DOJ)	Brazil (Ministério Público Federal) United Kingdom (Serious Fraud Office)	\$ 25,579,170 \$ 604,808,392
Odebrecht & Braskem (Dec. 2016)	\$ 3,557,625,337	\$ 252,893,801 (DOJ / SEC)	Switzerland (Swiss Attorney General) Brazil (Federal Prosecution Office)	\$ 210,893,801 \$ 3,093,837,736
Embraer (Oct. 2016)	\$ 205,000,000	\$ 185,000,000 (DOJ / SEC)	Brazil (Federal Prosecution Office) Brazil (Securities & Exchange Comm.)	\$ 19,300,000 \$ 1,800,000
GlaxoSmithKline (Sep. 2016)	\$ 509,000,000	\$ 20,000,000 (SEC)	China (Changsha People's Court)	\$ 489,000,000
VimpelCom (Feb. 2016)	\$ 795,300,000	\$ 397,600,000 (DOJ / SEC)	Netherlands (Openbaar Ministerie)	\$ 397,500,000

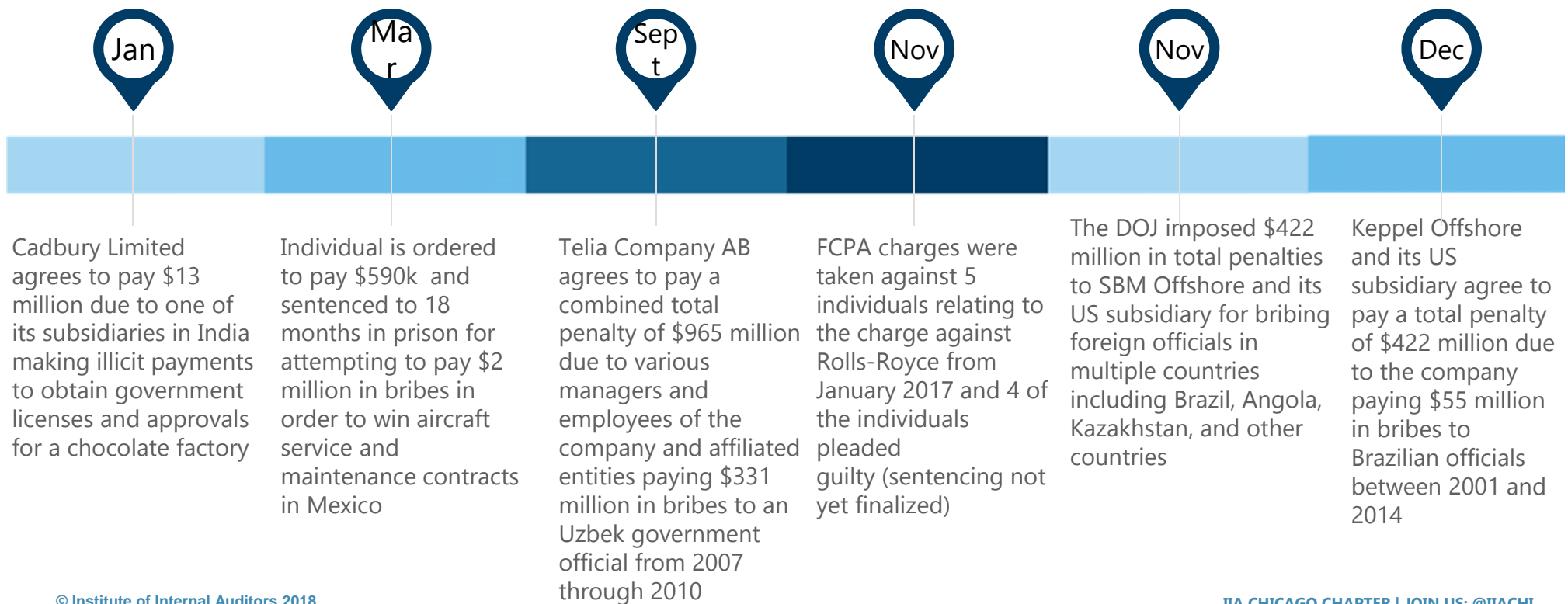


FOCUS ON INDIVIDUALS

- The 2015 “Yates Memo” was a key signal that DOJ and SEC would look to punish those individuals responsible for corporate misconduct
- In 2017, 20 individual FCPA prosecutions by the DOJ (~70%) - second highest number (2010 had the largest)
- Look to prosecute both domestic and foreign citizens/nationals



RECENT ENFORCEMENT ACTIONS (2017)



NO "TRUMP EFFECT"



- 39 enforcement actions in 2017, 21 of which occurred in the second half of the year
- Largest total combined penalty occurred in September 2017 (Telia - \$965 million)
- In 2016, budget for FCPA investigations was approximately \$3 billion, which led to a recovery of \$15 billion
- Experienced attorneys and leaders remain at the SEC and have surpassed multiple administrations

IMPORTANCE OF COMPLIANCE PROGRAMS



- DOJ Initiated FCPA Pilot Program in 2016
 - ✓ Voluntary disclosure of misconduct may result in declination of criminal prosecution
 - ✓ Eligible for up to a 50% reduction of applicable fines
 - ✓ During the 18 months of the pilot program, DOJ received 30 voluntary disclosures, a 66% increase over the prior 18 months

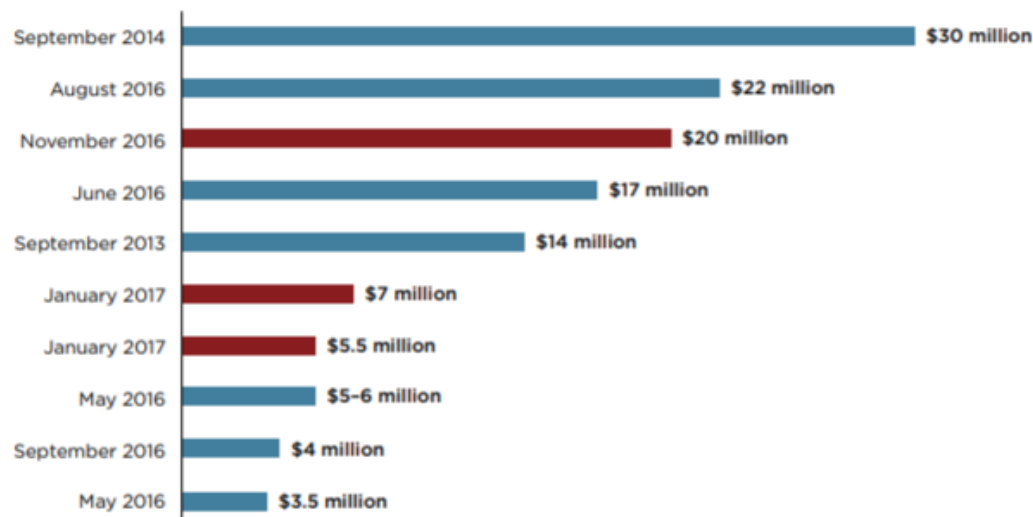
- In February 2017, DOJ released the “Evaluation of Corporate Compliance Program” questionnaire in order to provide a detailed approach for evaluating compliance programs

AWARDS FOR WHISTLEBLOWERS

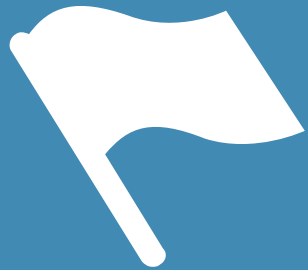
- In FY 2017, the SEC ordered whistleblower awards of nearly \$50 million to 12 individuals that either led to the start of an investigation or contributed to a successful enforcement action.

TOP 10 SEC WHISTLEBLOWER AWARDS

From program inception to end of Fiscal Year 2017, the SEC awarded approximately \$160 million to 46 whistleblowers.



RED FLAGS & COUNTRY RISKS



WATCH OUT FOR PAYMENTS MADE BY THIRD PARTIES...

- FCPA expressly prohibits corrupt payments made through third parties or intermediaries
- A significant number of enforcement actions for FCPA violations resulted from payments made by third parties acting on behalf of corporations, including:



- Lobbyists



- Consultants



- Brokers

- Freight forwarders



- Distributors

- Sales representatives

OTHER RED FLAGS / SCHEMES



I Use of sham vendors to pay bribes to employees of government-owned entities



II Make payments to a charity to entice a government official to intervene in any on-going agency investigations



III Use third-party sales promoters to make improper payments to government officials

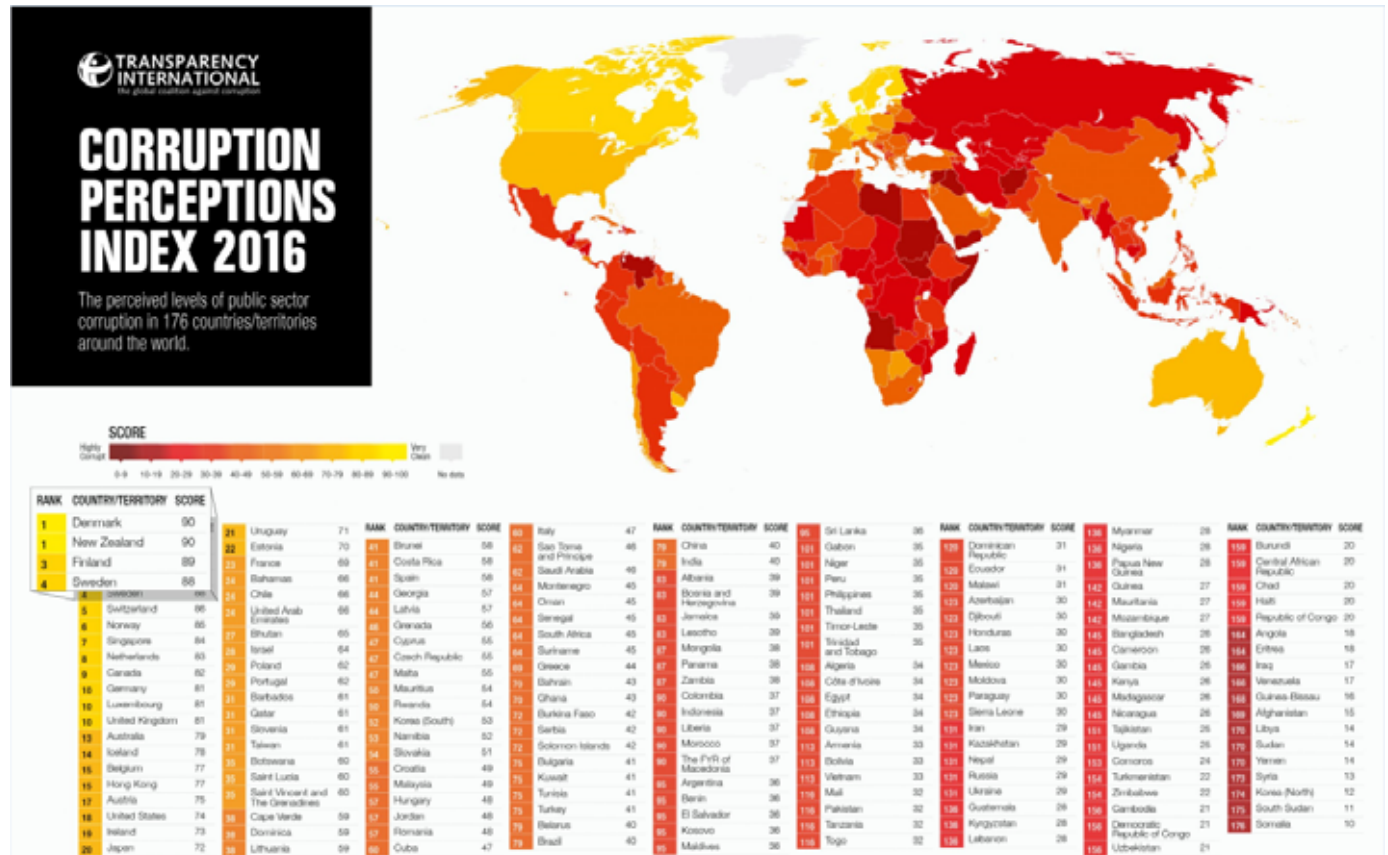


IV Use "pay-to-prescribe" schemes in order to increase sales by providing gifts, improper travel and entertainment, and cash and record these transactions as legitimate business expenses



V Provide bribes in the form of meals, gifts, and cash to government officials in order to obtain sales

EMERGING TRENDS – HEAP MAP



CHINA: MARKET CHARACTERISTICS

- **T-79** – China’s 2016 Corruption Perceptions Index (CPI)
- **300,000** – Number of Party officials punished for corruption in 2015.
- More than 1,000,000 officials have been punished for corruption since 2013



INDIA: MARKET CHARACTERISTICS

Based on recent Global Fraud Survey and Transparency International Survey:

- 58%** felt bribery and corruption happens widely in India
- 41%** felt that the level of corruption had increased in the last year
- 69%** paid a bribe to access basic services
- 9th** among 41 countries in bribery and corrupt practices in businesses. They are behind Ukraine, Cyprus, Greece, Slovenia, Croatia, Kenya, South Africa, and Hungary.

MIDDLE EAST: MARKET CHARACTERISTICS

68% believe that the government is doing an inadequate job in fighting corruption.

61% believe that corruption has increased in the 2015-2016 time period.

45% believe Tax Officials, Members of Parliament, and Government Officials are corrupt in the Middle East and Northern Africa.

30% do not report incidences of corruption because they are afraid to the ending consequences.

COMPLIANCE PROGRAMS & FRAMEWORKS



TOP ELEMENTS OF AN EFFECTIVE ANTI-BRIBERY FRAMEWORK

7 Elements of an Effective Compliance Program	Where is IA typically Involved?	Evaluation of Corporate Compliance Programs (Feb 2017)
Adequate Tone at the Top	X	Autonomy and Resources Senior and Middle Management
Adequate anti-corruption policies and procedures	O	Policies and Procedures Incentives and Disciplinary Measure
Perform an anti-bribery & anti-corruption (“ABAC”) risk assessment	✓	Risk Assessment
Third-party due diligence procedures	O	Third-Party Management
Implement a reporting mechanism (e.g. Compliance Hotline)	O	Confidential Reporting and Investigation Analysis and Remediation of Underlying Misconduct
Provide anti-corruption trainings	X	Training and Communications
Perform anti-corruption audits	✓	Continuous Improvement, Periodic Testing Review
	O	Mergers & Acquisitions

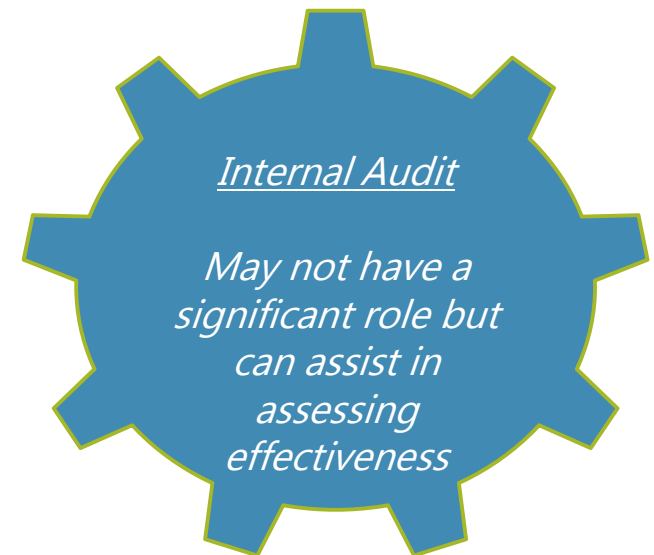
Key	
Lead	✓
Involved	O
Not involved	X

AUTONOMY AND RESOURCES & SENIOR AND MIDDLE MANAGEMENT

- How has the compliance function compared with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers?
- Have the compliance and relevant control functions had direct reporting lines to anyone on the board of directors?
- How have decisions been made about the allocation of personnel and resources for the compliance and relevant control functions in light of the company's risk profile?
- How has senior leadership modelled proper behavior to subordinates
- How is information shared among different components of the company?

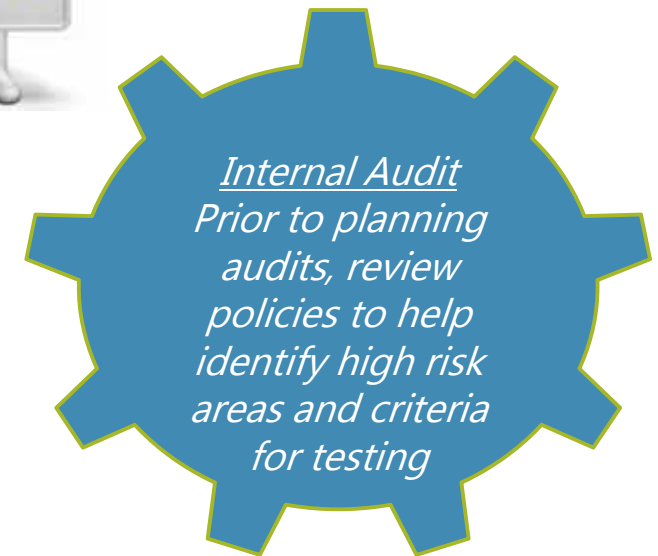
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POLICIES AND PROCEDURES INCENTIVES AND DISCIPLINARY MEASURES

- Prepare a distinct policy that provides operational guidance on:
 - Dealing with government officials
 - Misreporting and concealment in the company's accounting records
 - Use of third-party agents and consultants
 - Facilitating payments
 - Travel, entertainment and gifts
 - Other areas of high risk (customs, M&A, petty cash)
- How has the company assessed whether these policies and procedures have been effectively implemented?
- How has the company incentivized compliance and ethical behavior?
- Have the disciplinary actions and incentives been fairly and consistently applied across the organization?



RISK ASSESSMENT

Stage 1:

- Assess bribery and corruption risks by specifically looking at geographic locations, business partners, and nature of business activities
- Consider and assess the degree of business and interactions with government officials

Stage 2:

- Identify the policies and controls in place to mitigate corruption risk
- Analyze the effectiveness of the policies and controls and determine the residual corruption risk still facing the company

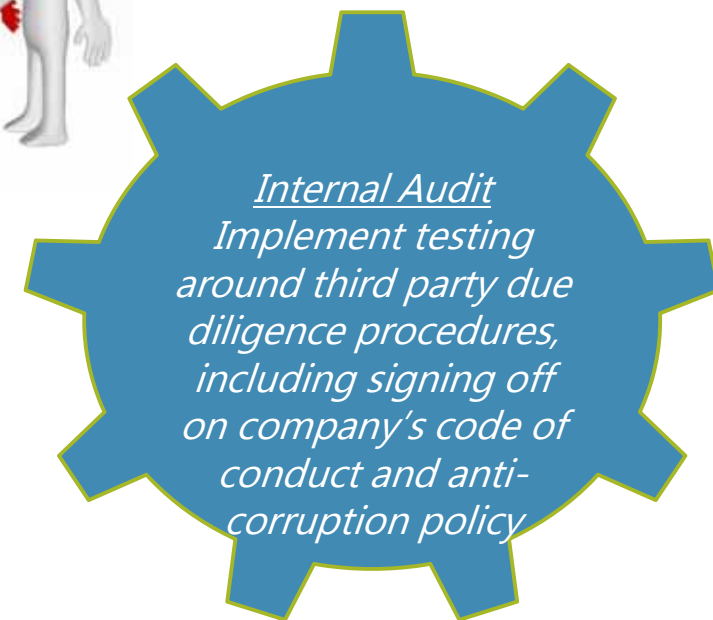
Stage 3

- Prepare a plan to remediate identified gaps and implement additional controls where needed



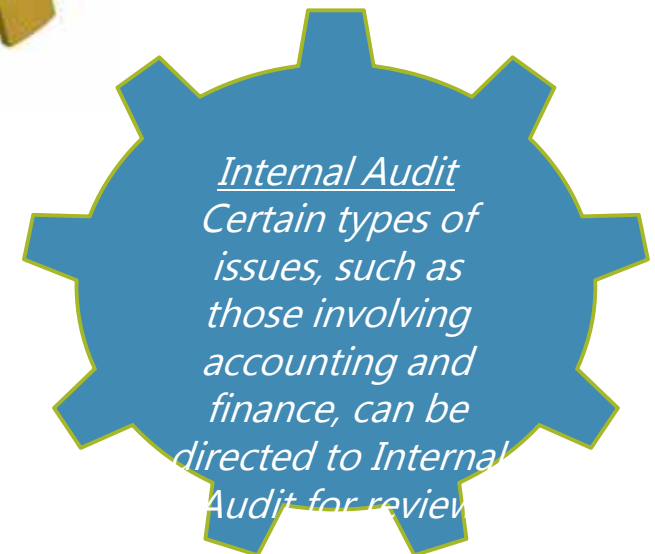
THIRD PARTY MANAGEMENT

- How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company?
- What types of background searches are performed on third parties?
- What company policies are third parties required to sign-off on?
- How has the company trained the relationship managers about what the compliance risks are and how to manage them?
- Were red flags identified from the due diligence of the third parties?



CONFIDENTIAL REPORTING AND INVESTIGATION ANALYSIS AND REMEDIATION OF UNDERLYING MISCONDUCT

- How has the company collected, analyzed, and used information from its reporting mechanisms?
- How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?
- How high up in the company do investigative findings go?
- Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations involving similar issues?
- What is the company's analysis of why such opportunities were missed?



TRAINING AND COMMUNICATIONS

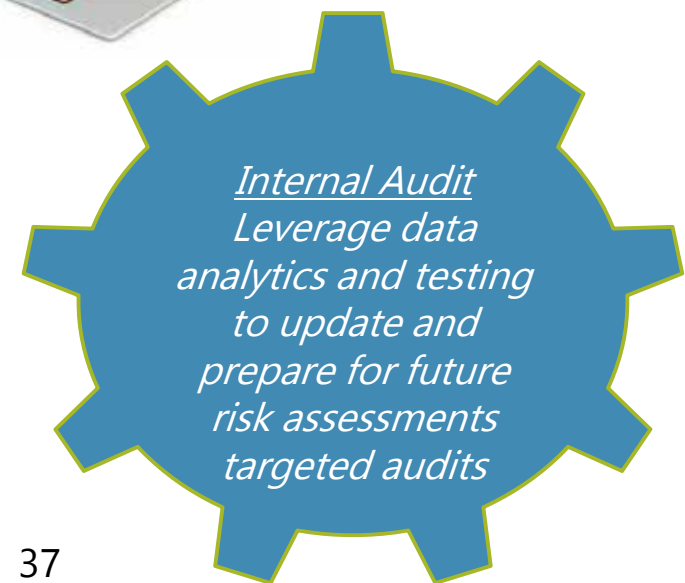
- What training in relevant control functions are required?
- Has the company provided tailored training for high-risk and control employees?
- What analysis has the company undertaken to determine who should be trained and on what subjects?
- How has the company measured the effectiveness of the training?
- What has senior management done to let employees know the company's position on the misconduct that occurred?
- What resources have been available to employees to provide guidance relating to compliance policies?



*Internal Audit
Not a significant role
but can provide input
on trainings involving
accounting, finance
or internal controls*

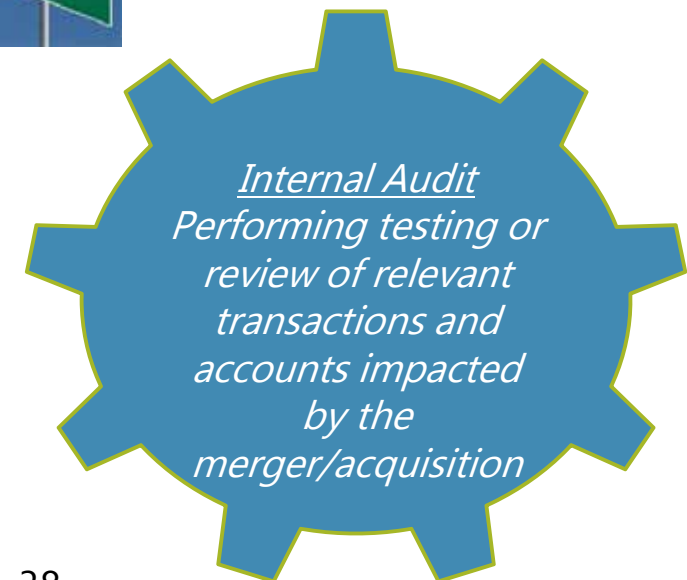
CONTINUOUS IMPROVEMENT, PERIODIC TESTING AND REVIEW

- What types of audits have identified issues?
 - Did those audits occur and what were the findings?
 - How have management and the board followed up?
- How often does internal audit generally conduct assessments in high-risk areas?
- Has the company reviewed and audited its compliance program in the area relating to the misconduct, including testing of relevant controls, collection and analysis of compliance data, and interviews of employees and third-parties?
- How often has the company updated its risk assessments and reviewed its compliance policies, procedures, and practices?



MERGERS AND ACQUISITIONS (M&A)

- Was risk of misconduct identified during due diligence?
- Who conducted the risk review for the acquired/merged entities and how was it done?
- What has been the M&A due diligence process generally?
- How has the compliance function been integrated into the merger, acquisition, and integration process?
- What has been the company's process for tracking and remediating misconduct or misconduct risks identified during the due diligence process?
- What has been the company's process for implementing compliance policies and procedures at new entities?



COMMON COMPLIANCE PITFALLS AND CONSIDERATIONS



LEADING PRACTICES & COMMON PITFALLS



Leverage outside expertise where appropriate

Constant monitoring, assessment and benchmarking of the program

Risk-based Approach



Spotting state-owned companies

Underestimating the Cost of Compliance



Risk of Third-Party Corruption

Fixating on Tone at the Top (and not involving middle management)

INVESTIGATION CONSIDERATIONS

- Delayed Response
- Ignoring Complaints
- Inappropriate Planning
- Mishandling Evidence
- Losing Objectivity
- Destroying Credibility
- Evidence Collection and Review Challenges – Most Costly Part of an Investigation
- Not Following up on Key Issues
- Overly Aggressive Tactics



CONFIDENTIALITY AND PRIVILEGE CONSIDERATIONS

➤ Communicating with Regulators and Privilege Considerations:

- Waiving Privilege
- Sharing Work Product

➤ Dealing With Other Stakeholders

- Shareholders
- Auditors

➤ Report Considerations:

- Report Format – Written vs. Verbal
- Who Sees the Report?
- Careful Consideration when Sharing Report



QUESTIONS?



THANK YOU FOR YOUR TIME!

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