

# FCPA – Now and Later



**PRESENTATION**  
**HBA Corporate Counsel Section**  
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# Purpose of FCPA



- Congress enacted FCPA in 1977 response to widespread Bribery of Foreign Officials by U.S. companies
- Purpose: Halt corruption
  - Create level field for honest businesses
  - Restore public confidence in marketplace

# FCPA - Enforcement



- **Department of Justice – Criminal**
  - Criminal enforcement of bribery/accounting provisions
- **Securities & Exchange Commission – Civil**
  - Civil enforcement of accounting & internal controls provisions
  - Injunctive relief, fines, disgorgement of profits



# 3 Categories of Persons/Entities Covered by Anti-Bribe Provisions



1. “Issuers” (If listed on securities exchange)
  - Officers, Directors, Employees, Agents & Shareholders
2. “Domestic Concerns”
  - Individual who is Citizen, National or resident of U.S.
  - Any corporation, Partnership, Association, Joint-Stock company, business trust, Unincorporated Organization or sole proprietorship

- Includes: Officers, Directors, Employees, Agents or Stockholders acting on behalf of Domestic Concern including Foreign Nationals or Companies

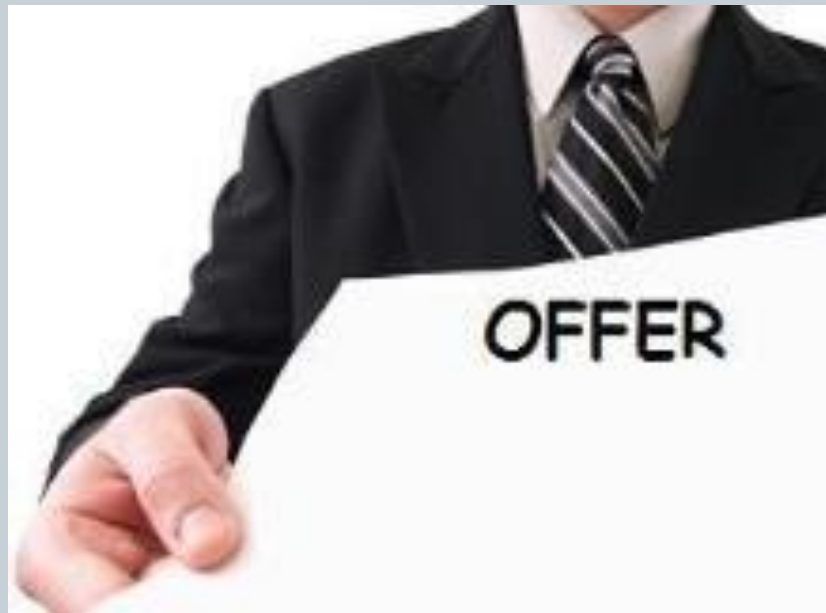
3. Person & Entities, other than Issuers & domestic Concerns Acting while in U.S. territory

# Bribery Offense Elements



- Corruptly offering or paying; a thing of value
  - To a “**foreign government official;**”
    - Directly, or
    - Indirectly, with knowledge;
    - For purpose of influencing an official act or omission, or securing an improper advantage;
      - Requires a quid pro quo
        - Not just gratuities or favors

- Offer or promise is enough
  - Don't need to actually provide value
- Completion / Result does not matter



# • Payment Must:

- Influence an act or omission, or
- Secure an improper advantage

There must be a nexus between bribe and the business





# “Persons”



- U.S. Companies
- “Any Person”
  - Foreign companies
  - Their officers, directors, employees, etc.
  - Foreign nationals not resident in U.S. that take an “act in furtherance” while in the U.S.
    - Very broadly interpreted

- Applies to any company, director, officer, employee, agent, or other individual who violates FCPA
- Liable for acts worldwide
- U.S. parent liability for authorizing or directing foreign subsidiary, foreign agents, representatives, or third parties to violate FCPA
- Foreign individuals and companies liable for acts that touch U.S.

- If a foreign company is state-owned or controlled; all employees are considered “foreign officials” and Covered Persons



# Payment



- Payment, offer, promise to pay (or authorization to pay, offer or promise) money or “**Anything of Value**”
  - “**Anything of Value**” is broad and includes gifts, services, offers of jobs and other benefits
  - Item of value need not be given directly to the foreign official

# “Thing of Value”

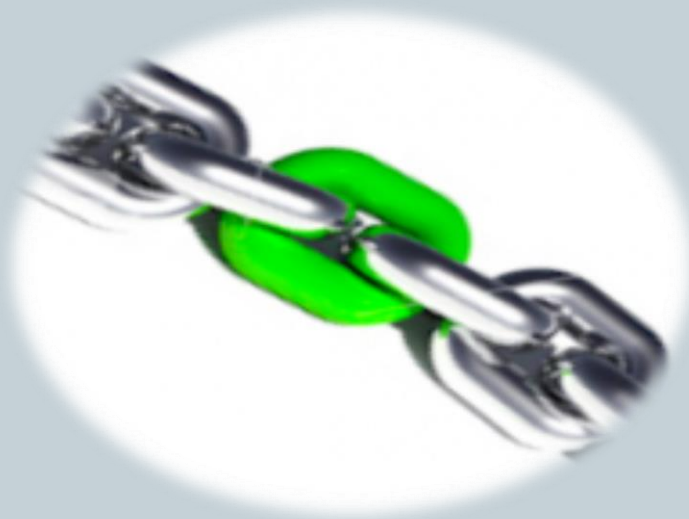
- Cash
- Charitable Donation
- Discounts
- Loan
- Investment
- Job Offer
- Promises even if not Accepted or fulfilled
- Overpayment
- Political Contribution
- Rebates/Commission
- Scholarship
- Employment of Official's family



# Intermediaries



- Payments by intermediaries acting on behalf of Company are violations if illegal payments are made



# Intermediaries



Types of third parties that can put you at risk:

- Subsidiary affiliate
- Agent, representative, distributor, consultant
- Freight forwarder
- Customs broker
- Joint venture Partner
- Relative of Foreign Official
- Employees of Foreign Official's company
- Any person acting on behalf of Company

# Red Flags



- Intermediary who:
  - Was recommended by official of foreign government customer
  - Charges fees in excess of fair market value for services provided
  - Requests payment in cash, in a third country or other unusual arrangements





# Gifts / Hospitalities



- Gifts and “hospitalities,” meals, travel, lodging and entertainment expenses provided to a foreign government official are common FCPA issues
- Prohibited if purpose is corrupt
  - Intended to wrongly influence official
- Transparency assists in determining whether it is corrupt
- Affirmative defense:
  - “Reasonable and Bona Fide” expenses

# Red Flags



- Excessive meals, lodging, transportation and entertainment
- Gift recipient has decision making authority in current or upcoming business, bid, contract
- Hospitality with no legitimate connection to business
- Repeated meals/entertainment
- Gift requested by intended recipient
- Requests to cover expenses for family members

# Corrupt Intent



- Induce the Foreign Official to misuse official power
- Attempt counts: offer or promise of a corrupt payment to a Foreign Official, even if never made
- Specific intent to violate the FCPA is not required; only intent to make a corrupt payment is needed

# Knowledge



- Actual knowledge
- Willful blindness or deliberate ignorance no defense
- Lack of knowledge that acts violate the FCPA is no defense



# Business Purpose of Payment



- Payment made to covered person to obtain, retain business, or direct business to secure improper advantage
- Example:
  - Obtaining permits/licenses required to conduct business, or reducing taxes fines



# Foreign Official



- “Government official” Is not defined by FCPA
- “Controlled” by government body, not defined



- Officer, employee or person acting in an official capacity on behalf of a non-U.S. “foreign” government
- Relatives or affiliate of foreign officials
- Employees of state-owned or controlled commercial enterprises
- Any department, instrumentality, agency of a foreign government
- Any officer or employee of public international organizations (World Bank, United Nations)
- Foreign political parties, their officials and political candidates
- Tribal head, mayor, governor, legislator, influential member of royal family

# Charitable Contributions



- Contributions to social/charitable projects can be conduits for corrupt payments





# Red Flags



- Charities, projects or contractors recommended or requested by government officials
- Donations under direction or at the suggestion of a government official
- Charities run or managed by government officials or their family members
- Charitable organization reluctant to issue receipt or publicly disclose donation

# Exception: Facilitating AKA “Grease” Payments



- Limited circumstances permitted
- Facilitating payments are small, infrequent payments made to expedite routine, non-discretionary governmental actions



# “Grease” or Facilitating Payments



- Gratuities to government official for clerical activities not involving discretion to expedite service
- Examples:
  - Customs clearance, vehicle registration, application processing, visa renewal, police protection, and utilities service
- Likely prohibited by local law
- Made in accordance with Company policy and reported in books and records

# Affirmative Defenses



- A. Payment lawful under the written laws and regulations of the country
- B. Payment is reasonable expenditure directly related to
  - The promotion of products or services, or
  - The execution of a contract with a foreign government or agency

# Accounting Provisions (Books and Records)



Keep records, “which, in reasonable detail, accurately and fairly reflect the transactions.”

- **Books and Records**

Required to make and keep detailed books, records, and accounts that fairly and accurately reflect transactions and dispositions of assets

- **Internal accounting controls**

- **Issuers must devise and maintain internal accounting controls to ensure that:**

- Financial records and accounts are accurate for external reporting,
- The books are audited at reasonable intervals
- Does not include privately held companies

# Sanctions



- **Criminal Penalties**

- Organizations

- Twice gross gain

- Or

- \$2 million per violation



- Individuals

- 5 years per count

- \$100k Fine

- Books & Records – Criminal Penalties

- Organization

- Individual



# Civil Penalties



- Disgorgement of Ill – Gotten Gain  
(SEC)
- Fine up to \$650,000 per violation



# Collateral Consequences



- Debarment
- Employment Ban
- Shareholder Suits
- Foreign Prosecution
- Monitors
- Compliance Program



# Fines, Penalties, Interest & Disgorgement Examples



## Company

## Amount

- |                     |           |
|---------------------|-----------|
| • Siemens           | • \$800 M |
| • KBR / Halliburton | • \$579 M |
| • BAE               | • \$450 M |
| • Daimler           | • \$200 M |
| • Baker Hughes      | • \$44 M  |
| • Willbros          | • \$32 M  |
| • Vetco             | • \$26 M  |
| • Volvo             | • \$19 M  |
| • ABB               | • \$16 M  |

# FCPA Triggers



- Government Action
- Civil Litigation
- SEC Reporting
- Mergers & Acquisitions Due Diligence
- Competitors
- Media Story
- SOX disclosure
- Whistleblower

# Trends in FCPA Compliance



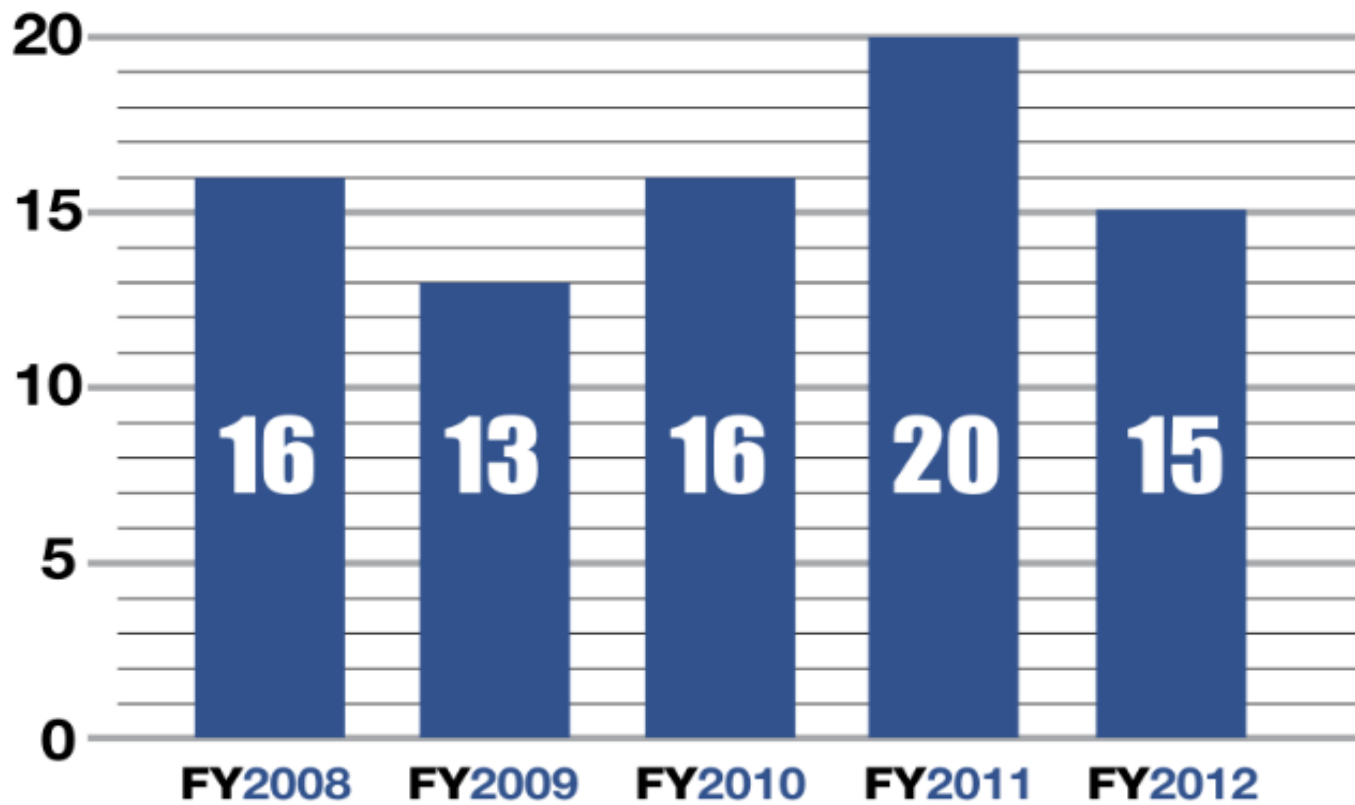
- Shifts toward individual accountability as deterrent
  - Target:  
Individuals who authorize bribes



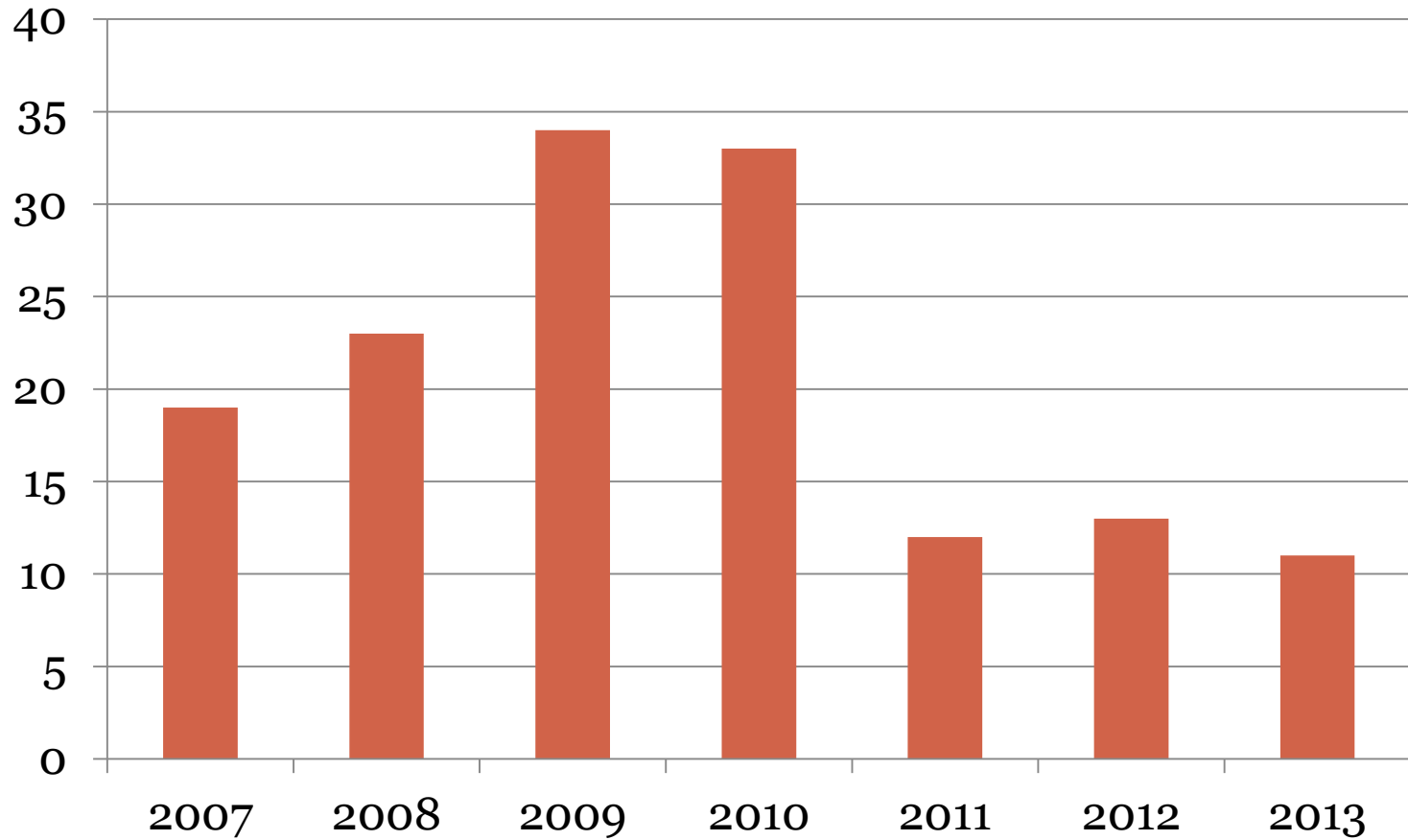
- Deferred prosecution & non-prosecution agreements in great use
  - Reward for self reporting & implementation of remedial action
  - Companies encourage cooperation with law enforcement
    - Sentencing guidelines
    - Management certifications
    - SOX compliance
    - Whistleblower
    - Monitor to oversee compliance

- Deferred Prosecution Agreement:
  - Reserves right to prosecute if company fails to comply with terms
    - Fines ex: Parker Drilling
      - \$11.76 M (Bribes paid to Nigerian officers)
- Non-Prosecution: Gov't Agrees not to bring criminal case
  - Key:
    - Self Report
    - Full cooperation with authorities
    - Implement Remedial measures
    - Conduct Risk assessment
    - Retooled compliance program

## FCPA Actions Brought By The SEC



## FCPA Actions Brought By The DOJ



- Additional Government Resources
  - DOJ/FBI
  - Use local USAO
  - Specialized SEC unit
  - Expanded use of tools
    - (Fraud, Money Laundering, Money Violations, Export)
  - Increased Global Cooperation with law enforcement
    - 2/13; 120 prosecutions from 30 countries in Washington DC regarding bribery



# UK Bribery Act



- Broader: Directly/Indirectly, offering promising or giving a financial or other advantage to another person, intending the advantage to induce or reward someone for performing a function improperly
  - Re: facilitation payment not allowed



# FCPA v UK Bribery Act



## FCPA

## UK BA

• Foreign Official Bribe	• +	• +
• Private Sector Bribe	• 0	• +
• 3 <sup>rd</sup> Party Liability	• +	• +
• Books/Records Violation	• +	• 0
• Grease Payments	• 0	• +

- World Regions Where Companies Experience Greatest FCPA Activity



- Nigeria
- India
- Russia
- Eastern Europe
- China
- Indonesia
- Mexico
- Middle East

- Industries:

- Oil/Gas
- Medical device/Pharmaceuticals
- Military products
- Telecommunications



# Newly Released DOJ/SEC guidance



- Nov. 2012, meant to clarify
- Provides no new bright lines
- Useful points:
  1. Successor Liability

Enforcement if successor company directly participated or failed to stop misconduct from continuing
  2. Compliance Programs

Enforcement focus on:  
Was program “well – designed”  
Applied in Good Faith  
Did it work?

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