Topics for Discussion

- The FCPA and UK Bribery Act
- Global Enforcement Trends
  - Detail on China, India, Russia
- When Compliance Conflicts With Local Laws
  - The Complaint
  - The Investigation
  - Taking Action
  - Reporting
The FCPA: An Overview

- **Anti-Bribery Provision:**
  - Illegal to corruptly offer or provide money or anything of value to officials of foreign governments with intent to obtain or retain business.
- **Books and Records Provision:**
  - Requires issuers to make and keep books, records, and accounts, which, in “reasonable detail,” accurately and fairly reflect the issuer’s transactions and dispositions of assets.
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  - There is no materially threshold as, for civil enforcement by the SEC, no knowledge requirement for an issuer.
  - Enforcement actions typically involve either misreporting large bribes payments or widespread inaccurate recording of smaller payments made as a part of a systemic pattern.
- **Internal Controls Provision:**
  - Requires that issuers adopt and maintain reasonable internal accounting controls aimed at preventing and detecting FCPA violations.
  - Internals controls must provide “reasonable assurance” transactions are properly recorded.
  - SEC civil violations do not require knowledge of an issuer.

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### Top 10 FCPA Settlements: Two 2014 Settlements among the Largest

<table>
<thead>
<tr>
<th>No.</th>
<th>Company</th>
<th>Total Settlement</th>
<th>SEC Component</th>
<th>DOJ Component</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Siemens AG*</td>
<td>$604,000,000</td>
<td>$560,000,000</td>
<td>$46,000,000</td>
<td>3/13/2015</td>
</tr>
<tr>
<td>2</td>
<td>Alstom S.A.</td>
<td>$579,000,000</td>
<td>$550,000,000</td>
<td>$29,000,000</td>
<td>12/22/2014</td>
</tr>
<tr>
<td>3</td>
<td>Technip S.A.</td>
<td>$400,000,000</td>
<td>$380,000,000</td>
<td>$20,000,000</td>
<td>12/22/2014</td>
</tr>
<tr>
<td>4</td>
<td>KBR/Halliburton</td>
<td>$400,000,000</td>
<td>$380,000,000</td>
<td>$20,000,000</td>
<td>12/22/2014</td>
</tr>
<tr>
<td>5</td>
<td>E.ON AG</td>
<td>$379,000,000</td>
<td>$338,000,000</td>
<td>$41,000,000</td>
<td>12/1/2014</td>
</tr>
<tr>
<td>6</td>
<td>Alcoa</td>
<td>$384,000,000</td>
<td>$365,000,000</td>
<td>$19,000,000</td>
<td>2/4/2010</td>
</tr>
<tr>
<td>7</td>
<td>Technip S.A.</td>
<td>$350,000,000</td>
<td>$320,000,000</td>
<td>$30,000,000</td>
<td>12/22/2014</td>
</tr>
<tr>
<td>8</td>
<td>Snamprogetti/ENI</td>
<td>$245,200,000</td>
<td>$223,000,000</td>
<td>$22,200,000</td>
<td>1/9/2014</td>
</tr>
<tr>
<td>9</td>
<td>BAE Systems</td>
<td>$240,000,000</td>
<td>$218,800,000</td>
<td>$21,200,000</td>
<td>12/22/2014</td>
</tr>
<tr>
<td>10</td>
<td>Eni SpA</td>
<td>$223,000,000</td>
<td>$202,000,000</td>
<td>$21,000,000</td>
<td>12/22/2014</td>
</tr>
</tbody>
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* Siemens AG, FCPA violations are consolidated with a $400 million (Cayman Islands) settlement resolution with the Department of Justice.
* BAE Systems agreed to pay $350 million, plus three years of deferred prosecution, and will hire a monitor, but the alleged large (up to $984 million) in a case of misconduct.
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U.K. Bribery Act: An Overview

Four Separate Offences:
1) Offering, promising, or giving a bribe to a person (including private parties)
2) Agreeing to receive or accepting a bribe
3) Offering, promising, or giving a bribe to a foreign government official with the intent to influence the performance of his or her functions as a public official in order to obtain or retain business or a business advantage
4) Failing as a commercial organization to prevent bribery by associated persons

Impact of the UKBA:
- Expands the definition of criminal conduct, including a new strict liability offense
- Expands the range of organizations and individuals subject to U.K. corruption law
- Increases maximum penalties for violations
- Criminalizes private commercial bribery
- Does not require that the bribery of a government official had an improper purpose or corrupt intent

U.K. Bribery Act: FCPA v. UKBA

<table>
<thead>
<tr>
<th>Provision</th>
<th>FCPA</th>
<th>Bribery Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Who is Covered?</td>
<td>Issuers, developers, and any other persons who take any act to further a corrupt payment within the territory of the U.S.</td>
<td>U.K. companies, citizens, and residents, and U.S. nationals and entities where any act takes place in U.K. “Failure to prevent bribery” offense applies to any entity, regardless of whether the bribery was a commission to U.K.</td>
</tr>
<tr>
<td>Active vs. Passive Offenses</td>
<td>Only the act of paying or offering a bribe is prohibited.</td>
<td>Active (paying or offering a bribe) and passive offenses (accepting a bribe) are prohibited.</td>
</tr>
<tr>
<td>Recipient of Bribe</td>
<td>Only bribes paid or offered to a “foreign official”</td>
<td>Only bribes paid to any person to induce them to act “corruptly.”</td>
</tr>
<tr>
<td>Corporate Liability</td>
<td>For failure to maintain adequate systems of internal controls</td>
<td>For failure to prevent bribery, subject to defense of having “adequate procedures” in place</td>
</tr>
<tr>
<td>Facilitating Payments</td>
<td>Enormous fine or imprisonment for foreign official to enable or assist the performance of a corrupt commercial government function</td>
<td>No facilitating payments exception</td>
</tr>
</tbody>
</table>
U.K. Bribery Act: FCPA v. UKBA

Both the FCPA and U.K. Bribery Act reach individuals who do not directly engage in corrupt activities, but who permit them.

- In addition to persons who bribe or accept bribes, the Bribery Act explicitly provides that senior officers, including directors, company secretaries, and managers, who "consented or connived" in any of the offenses set forth in the Act may be held personally liable for that offense.

- In the U.S., the SEC has pursued expansive theories of director and officer liability:
  - Civil liability as a "control person" (Nature’s Sunshine, 2009)
  - Civil liability for "aiding and abetting," by failing to implement internal controls (Sprint, 2007)

Many commentators describe the U.K. Bribery Act as the "FCPA on steroids." —Wall Street Journal (Dec. 28, 2010)

Global Enforcement Trends

- Governments across the world are dedicating more resources to investigating and prosecuting acts of corruption and bribery.
- In recent years, many countries have adopted new anti-corruption legislation, including Brazil, China, Russia, Italy and Mexico.
- Extensive formal and informal cooperation among countries is becoming more common, particularly between the U.S. and EU countries (see Siemens AG case)
- OECD Anti-Bribery Convention and UN Convention Against Corruption are helping drive the issue.
Global Enforcement: Cross-Border Enforcement

European Nations Are Cooperating with the U.S. in Cross-Border Prosecutions

- **Spotlight on Germany**
  - Germany is second only to the U.S. in active enforcement of the OECD Anti-Bribery Convention
  - German prosecutors have cooperated with the DOJ and SEC in FCPA investigations and prosecutions, notably in the Siemens AG case
  - German prosecutors initially began investigating Siemens in 2005
  - The DOJ and SEC joined the investigation in 2006, shortly after German officials raided Siemens’s headquarters and the homes of its executives
  - German and U.S. authorities worked together during the investigation
  - Siemens ultimately settled with U.S. and German authorities for $800 million and $781 million respectively
  - Individuals managers and executives have also been convicted for their roles in the bribery scheme
  - Other managers and executives are still under investigation

China’s New Leadership Brings Changes in Laws and Enforcement

The anti-graft campaign launched by President Xi Jinping in November 2012 has lead to an explosion of enforcement activity.

Recent changes to anti-bribery laws and policies include:

- A 5-year anti-corruption plan was launched in December 2013 that:
  - orders officials to submit reports annually on their anti-graft reform progress
  - expands pilot projects that require newly nominated officials to disclose their private assets
  - urges anti-graft training for Party members and officials, with a focus on law and corruption cases to warn them of the consequences
  - states that “commercial bribery will be handled sternly and probed, and punishments for giving bribes will be harsher”
  - Cross-country “check and awe” anti-graft inspection tours of several government ministries, state-owned enterprises, banks, and universities.

Communist Party Calls for Commercial Bribery Crackdown

“A crackdown on commercial bribery by multinationals is deeply significant to safeguarding the order of the market economy and protecting an environment of fair competition.” – People’s Daily (7/17/2013)

Chinese Anti-Corruption Laws

Chinese law punishes both the giving and taking of bribes. Chinese criminal law has provisions criminalizing these three types of bribery:

1. **Official Bribery**: Criminalizes bribery of “state functionaries” or “government organs.” Harsh penalties applicable, including the death penalty. Accepting bribes of half a million yuan is considered a major bribery offense.
2. **Commercial Bribery**: Criminalizes bribery of “staff of a company or enterprise” and imposes record-keeping obligations. Employers are liable for the acts of their employees. Less harsh penalties, no death penalty.
3. **Foreign Bribery**: In 2011, China amended its criminal law to criminalize bribery of “any foreign public official or official of an international public organization.”
Enforcement Trends in China

- Increased Coordination Between U.S. and Chinese Authorities
- Shift to Supply-Side Enforcement
  - Chinese authorities historically focused more on demand-side enforcement by targeting corrupt government officials. This approach is shifting towards the companies and individuals who are suspected of committing commercial or criminal bribery violations.
- Corruption Risk Increases in Economic Slowdown
  - Incidents of fraud may rise to compensate for lower profits as China’s economy slows. At the same time, Beijing’s austerity measures and anti-graft crackdown may make violations more covert.
- Key Role of Whistleblowers
  - 32% of graft cases probed by Chinese prosecutors were initially exposed by whistleblowers.

2014 General Elections: Anti-Corruption Fervor Sweeps Narendra Modi into Power

Anti-corruption promises figured prominently in Prime Minister Narendra Modi’s 2014 campaign. Since taking office in May, some of the Modi administration actions include:

- The administration’s first large-scale corruption crackdown (August 2014), involving the raid of 10 locations in connection with the Coalgate scandal. Those arrested include the head of a state-owned bank.
- A review of all state-owned hospitals in a bid to end corruption in India’s healthcare sector.
- A campaign to bring back money— IllegalStateException accounts—back to India and redirect funds to the working class.

“Corruption is troubling us. People are angry. I assure that we will fight corruption and work with all those against graft. Corruption has ruined the country. I promise that we will fight against corruption with all might.”

Indian Anti-Corruption Laws: The PCA

Prevention of Corruption Act, 1988

- Section 7: Prohibits Indian public servants from accepting any gratuity or any valuable thing for doing or forbearing an official act.
- Section 11: Prohibits Indian public servants from accepting any valuable thing without consideration or adequate consideration.
- Section 16: Prohibits any person from receiving any gratuity for illegally influencing an Indian public servant to do or forbear an official act.
- Section 10: Allows the government to promote any person to a public servant (defence personnel cannot be tried by ordinary criminal court).

PCA Amendments: Shift to Private Sector Enforcement

Parliament has introduced a bill that would substantially alter the country’s 35-year-old anti-corruption law. The law figures to be a key plank of legislation for Prime Minister Modi and Parliament in 2015. Two key proposed amendments may have far-reaching effects on how multinational corporations conduct business.

- The amendments make it clear that anyone associated with the organization—officers or agents—can be held to criminal or administrative liability if it is proved that the organization is guilty of an offense. The proposed bill also introduces the concept of “strict liability” in commercial offenses. The bill also provides that, where a commercial organization is guilty of an offense, every person who, at the time of the offense, was in charge of, or responsible to, the conduct of the business shall be deemed guilty unless that person proves to the court that he did not know (or should not have known) about the conduct at issue. Notably, the bill provides a defense where a commercial organization can show that it “took all in good faith appropriate precautions designed to prevent persons associated with it from undertaking such conduct.”
Indian Anti-Corruption Laws: Companies Act

India's new Companies Act, which came into effect on April 1, 2014, places additional obligations on companies and their management.

Key Provisions

§ 128(3) Requires that every balance sheet or profit and loss statement present "a true and fair view" of the company's affairs.

§ 134(5) Requires directors of listed companies to certify annually that their company has implemented internal financial controls, and "proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively."

§§ 134(8), 447 Significant penalties for fraud and non-compliance, which include fines and prison for "officers of the company."

§ 177(9) Directs listed companies to establish a "vigil mechanism" for directors and employees to report "suspect or criminal acts."

§ 245 Allows, for the first time, class action lawsuits against a company.

Indian Anti-Corruption Laws: Lokpal Update

India's historic anti-corruption movement led to the passage of the Lokpal and Lokayuktas Act (2003). Among other things, the law aims to:

• Create an independent body (the "Lokpal") with broad powers to investigate corruption complaints against the highest political authorities, including the Prime Minister;

• Enhance maximum punishment for corruption from 7 years to 20 years imprisonment;

• Mandate that every state create a local anti-corruption investigation agency ("Lokayuktas"); and

• Allow the Lokpal to investigate any person (which includes legal entities) involved in violating provisions of the PCA, bribery or taking, or conspiracy related to any violation of the PCA.

• Implementation of the law remains ongoing as lawmakers contemplate changes to the law's processes for selecting members of the Lokpal.

Other Proposed Laws and Initiatives

• Law punishing Indian individuals who bribe foreign government officials.

• Revisions to the Penal Code that would prohibit commercial bribery.

• Stronger guidelines and transparency in public procurement.

• Sector integrity pacts obligating parties to government contracts to conduct business ethically.

• Enhanced whistleblower protection laws.

Enforcement Trends in India: By the Numbers

The latest statistics show that Indian authorities are focused on enforcement of the Prevention of Corruption Act.

The Anti-Corruption Division handled around 38% of all cases registered by the CBI in 2013. This is an increase from 25% in 2010.

According to the latest statistics, convictions under the Prevention of Corruption Act continue to increase. Convictions against non-government individuals nearly doubled from 2012 to 2013.
Russian Anti-Corruption Laws

In 2011, Russia revamped its anti-corruption laws by adding a tiered system of fines and prison terms, and criminalizing the bribery of foreign officials.

- Added the crime of aiding and abetting bribery.
- Foreign officials are required to disclose and surrender any unexplained or unreported assets, or assets that appear incompatible with their official duties (up to $175,000).
- The fine for individuals accepting a bribe can be a prison term up to 10 years and a fine of up to 70 times the bribe amount.
- The fines for individuals paying a bribe can be a prison term up to 12 years and a fine of up to 70 times the bribe amount.
- Civil responsibility for legal entities includes increased fines (up to 100 times the bribe amount).
- Criminal penalties for individuals include fines between 10 and 90 times that of the bribe amount or a fine of up to 100 times the bribe amount.

The government had long been considering plans to introduce a tiered system of fines for violations of Russian anti-corruption laws. That campaign has taken on new urgency as Russian sanctions, driving up consumer prices, have made it more difficult for citizens to pay bribes in foreign currencies.

Under a law passed by the Duma on September 26, Russian citizens and companies will have to report all their income and assets to the Russian authorities if their holdings in foreign juridical persons are used to conceal assets that are subject to sanctions.

The law remains in draft form and is subject to changes in the courts. Financial Times, 10/30/2014

De-Offshorization Law in the News:

The debate over the de-offshorization law, which is intended to prevent Russian citizens from using offshore entities to conceal assets, has been contentious. The law's provisions vary greatly from one foreign jurisdiction to another, and some experts believe it will be difficult to implement.

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De-offshorization law was passed and entered into force on January 5, 2015.

Enforcement Trend in Russia: Fostering Corporate Compliance

As of January 5, 2015, according to article 33.3 of the Law “On Corruption Counteraction,” companies operating in Russia are required to take affirmative compliance measures to prevent corruption in their business.

- Such measures may include, among other activities:
  - “White coat” compliance teams;
  - Vehicles and equipment for compliance;
  - Appointment of a compliance expert;
  - Training programs;
  - Prevention of corruption behaviors;
  - The Russian Ministry of Labor and Social Protection issued guidance with recommendations in order to ensure a unified approach for preventing and combating corruption in organizations.

In August 2014, Transparency International Russia published the report “Transparency of Corporate Reporting and Anti-Corruption Policy in Russian Private Enterprise Compliance on a Comparative Advantage.” The study investigated the websites and legal documents of 98 Russian companies and holdings, which had been on Forbes’ 2013 “Most Powerful in Russia” list. The report’s conclusions include the following:

- Neither the Russian government nor private companies are interested in adopting international business practices.
- Russian enforcement agencies may show attention to the law’s prohibition on the use of tax havens for tax and asset evasion, but remain unwilling to impose stiff penalties that would force companies to establish anti-corruption compliance programs.
- In recent years, companies themselves do not have a code of ethics or a policy of zero tolerance toward corruption, but are often unable to publish required declarations.
A Hypothetical Scenario

- You are the General Counsel of BigCo, a multinational corporation that specializes in selling equipment for industrial uses to state owned enterprises around the world. BigCo is listed on the New York Stock Exchange and is currently under a DPA with DOJ as a result of a bribery case in Asia that it settled two years ago.

- BigCo has an office in Corruptistan, an oil rich country on the Eurasian land mass.

- Although Corruptistan is a signatory to the UN Convention Against Corruption and the OECD Anti-Bribery Convention, it consistently receives poor evaluations from both the OECD Working Group on Bribery and Transparency International, both of which have stated publicly that government contracts are permeated with bribery and that law enforcement does more to further corruption than to stop it. According to international human rights organizations, law enforcement officials in Corruptistan routinely violate human rights and frequently torture suspects in order to force them to confess.

Hypothetical Scenario: The Complaint

- Yesterday, your Regional Counsel for EMEA called to tell you that she had received a whistleblower complaint from an employee in your office in Corruptistan, an oil rich country on the Eurasian land mass. The employee claimed that the Country Manager in Corruptistan had paid bribes to local government officials to help BigCo win several multi-million dollar contracts over the last several years.

- Corruptistan law provides that "any citizen having evidence that a crime has been committed against the state of Corruptistan must provide such evidence to the appropriate law enforcement authority."
You immediately hire an outside law firm, ABC, to conduct a full investigation. ABC does not have an office in Corruptistan but it does have a relationship with a local law firm, several of whose lawyers also work simultaneously in the General Prosecutor’s Office, an arrangement which is not prohibited under local law.

Remember, Corruptistan law provides that “any citizen having evidence that a crime has been committed against the state of Corruptistan must provide such evidence to the appropriate law enforcement authority.”

Also, under the law of Corruptistan, “investigations which may result in criminal prosecution may only be carried out by duly authorized law enforcement officials in the Republic of Corruptistan, unless otherwise provided for by the laws of Corruptistan or international treaty obligations of Corruptistan.”

Corruptistan law prohibits the processing of personal data “without the express consent of the data subject.”

The Country Manager signed a standard BigCo employment contract which provides that “the employee agrees not to conduct personal business during work hours or on BigCo premises.” Nevertheless, he refuses to surrender his work computer for imaging by ABC on the grounds that he frequently uses it for personal correspondence. He says that if the ABC lawyers insist on taking it from him, he will report them to his friends in the Ministry of Internal Affairs and have them arrested.

The whistleblower has stated that the Country Manager paid the bribes with the assistance of Pierre, the former Sales Manager for Eurasia. Pierre is now working in BigCo’s office in France. He agrees to turn over his laptop for imaging, but only if ABC agrees to inform the labor union to which he belongs and only if the labor union agrees that the review of his emails is legal under French law.

The local Paris office of ABC has informed you that under French law, all employers who process personal data of their employees must record such processing in a public register.
Hypothetical Scenario: Taking Action

- After ABC reviewed his emails, which turned out to be extremely incriminating, Pierre admitted to the ABC lawyers that he and the Corruptistan Country Manager paid numerous bribes over several years to win "approximately ten public contracts" for BigCo. He has agreed to resign his position with the company and continue to cooperate with the investigation if he is given two years severance pay and if the company agrees to provide him with a good recommendation for any job he subsequently applies for.

- Corruptistan law provides that no employee may be fired for criminal misconduct unless the employee (a) admits to the misconduct and signs a confession setting out all the relevant facts of the misconduct or (b) is convicted of the misconduct in a court of law.

- The Country Manager has agreed to sign a confession, but only if he is given three years severance pay and only if ABC agrees not to report his misconduct to Corruptistan law enforcement.

Hypothetical Scenario: Reporting

- Corruptstan law also provides that disclosure of sensitive information which may affect the interests of the government of Corruptistan to a foreign government, without the consent of the government of Corruptistan, may be criminally prosecuted.

Winston Y. Chan

Winston Y. Chan is a partner in Gibson, Dunn & Crutcher's San Francisco office. He is an experienced trial and appellate attorney, and a member of the firm’s White Collar Defense and Investigations Practice Group. He regularly represents clients in civil and criminal investigations and proceedings, including governmental investigations, internal investigations, compliance reviews and representation of individuals, both domestically and abroad. In 2016, Mr. Chan was named as co-counsel in one of the five subordinates "Rising Stars" in the government enforcement defense and investigations field. benchmark litigation has recognized Mr. Chan as a 2015 California litigation star for being "recommended consistently as a reputable and effective litigator by clients and peers.”

From 2005 to 2012, Mr. Chan served as an Assistant United States Attorney in the Eastern District of New York, where he investigated and prosecuted a wide range of matters as part of that office’s Business and Securities Fraud Unit, including Foreign Corrupt Practices Act violations, fraud based on securities fraud, insider trading, accounting fraud, market manipulation, boiler room fraud, and fraudulently offering securities. Mr. Chan served in a number of supervisory roles, and received a variety of awards and commendations.

Mr. Chan received his undergraduate degrees in economics and law from Yale University, and his J.D. from Stanford Law School, where he was on the law journal. Following law school, Mr. Chan served as a law clerk for the Honorable Dennis M. Kozlowski of the United States District Court for the Southern District of New York, and then for the Honorable PierreOOT of the Second District of the United States Court of Appeals for the Second Circuit.
LAUREN REYNOLDS

Lauren Reynolds is a U.S.-qualified attorney and Regional Compliance Attorney for Europe at Microsoft Corporation. In this capacity she is in charge of overseeing regional internal investigations and enforcing Microsoft's compliance policies. Before joining Microsoft, Ms. Reynolds was a member of the Gibson Dunn & Crutcher's White Collar Defense and Investigations Group and International Corporate Transactions Group in Munich. Ms. Reynolds focuses on corporate compliance and on white collar criminal matters, in particular on issues related to the enforcement of the Foreign Corrupt Practices Act (FCPA). Ms. Reynolds has advised as a member of a larger team on matters arising from FCPA Compliance Monitorships and numerous internal investigations relating to compliance and disclosure issues under the FCPA.

Ms. Reynolds earned her undergraduate degree from Columbia University, and her Juris Doctor, cum laude, from Georgetown University Law Center. Ms. Reynolds holds a Master of Laws from Humboldt University of Berlin.

THOMAS FIRESTONE

Thomas Firestone is a partner in the Washington office. Since joining in 2012, he has worked in the Moscow and London offices and remains a member of London’s Compliance and Risk Management Group. He previously worked at the US Department of Justice, first as an Assistant US Attorney in the Eastern District of New York handling transnational organized crime, and then as Resident Legal Adviser and, intermittently, Acting Chief of the Law Enforcement Section at the US Embassy in Moscow. In the latter capacity, he twice won the US State Department Superior Honor Award for his work on US-Russian law enforcement cooperation and promotion of the rule of law. He also won a special award from the Russian Federal Anti-Monopoly Service for promoting US-Russian cooperation in combating transnational criminal cartels.