FCPA and Global Compliance: Lessons Learned from International Investigations

March 27, 2018
Your instructor

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Boston, MA

RSM’s forensic accounting and investigative professionals have the skills and experience to resolve high-stakes issues from the board room to the courtroom. Our team provides analytical and investigative services to major law firms, insurance companies, financial institutions, governmental entities, private equity firms, venture capital funds and corporate counsel and executive management. Team members include expert testifiers, witness interviewers, data mining and computer forensic specialists, fraud examiners qualified as international investigators, CPAs and others needed to document facts.
## Agenda

<table>
<thead>
<tr>
<th>Topic</th>
<th>Minutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>RSM’s 2016 Global Corruption Law Compliance Survey</td>
<td>10</td>
</tr>
<tr>
<td>Introduction to Anti-Bribery / Corruption Regulations</td>
<td>20</td>
</tr>
<tr>
<td>Common Red Flags</td>
<td>10</td>
</tr>
<tr>
<td>Recent Updates</td>
<td>10</td>
</tr>
</tbody>
</table>
The Foreign Corrupt Practices Act ("FCPA") is at near the top of your companies’ key risk areas if you are doing business internationally.

The DOJ and SEC remain focused on investigating violations and enforcement of the law. Recent FCPA settlements demonstrate that no industry is immune from scrutiny and the trend towards higher penalties involving multiple regulators has continued.

As more countries and international organizations ramp up their anti-corruption enforcement the need for effective anti-corruption programs grows.

You seek knowledge and tools to help you spot issues early, develop workable risk management processes, plan and manage internal investigations, and implement effective compliance programs.
By the end of this course, you will be able to:

- Recognize the key elements of a) FCPA including the accounting provisions and the anti-bribery provisions and b) other significant anti-corruption regulation and global standards including U.K. Bribery Act, including:
  - Enforcement trends: Recent cases, DOJ’s Corporate Enforcement Policy, DOJ policy against “piling on”, multi-jurisdictional investigations, and international anti-corruption developments
  - Board and management responsibilities for anti-corruption programs and investigations
  - Practical tips and best practices for internal auditors dealing with critical FCPA issues
  - How to manage risk in various third-party relationships and corporate acquisitions
  - How to get the most from your anti-corruption compliance program and take it to the next level
  - Ethical issues confronting internal auditors including whistleblower complaints
Polling question

• What type of profession are you in?
  A. Consultant
  B. Corporate Internal Audit / Compliance
  C. Corporate Finance / Accounting
  D. Corporate Fraud / Ethics Compliance Investigator
  E. Other
Polling question

- Does your organization do business internationally?
  A. Yes
  B. No
• Does your organization do business with government or quasi-government agencies (e.g. World Bank, FIFA, etc.) or government owned entities?

A. Yes
B. No
RSM’s Global Corruption Law Compliance Survey
RSM Global Corruption Law Compliance Survey

• Gathered feedback from 159 middle-market executives
• Asked participants 30 detailed questions in three key segments:
  − Awareness and leadership perspectives on fraud
  − Fraud prevention practices & readiness to investigate
  − Whistleblowers and fraud reporting issues
CHALLENGES LIKELY TO BE FACED WHEN CONDUCTING BRIBERY OR CORRUPTION INVESTIGATIONS

- Cultural differences or diverse business norms across countries
- Financial or budgetary constraints
- Logistical constraints (e.g., communications)
- Inability to accurately measure costs or benefit of compliance efforts
- Personnel constraints
- Limited familiarity with global corruption laws and best practices
- Limited access to comprehensive database of relevant laws and regulations
- Limited ability to ensure involvement by business units
- Limited commitment by senior management
- Pressure to maintain profitability
- Other
- No challenges

(% of participants - frequency 159)
64 percent of executives said entertainment payouts to retain customers, which under certain circumstances can be an illicit practice, was widespread in global business. Meanwhile, 58 percent of those leaders said such entertainment expenses would be acceptable in their own companies to help maintain a competitive footing.
Eighty-seven percent of leaders polled reported they were “extremely” or “very” worried about the activities of these third parties, particularly when they had been recommended by local officials in foreign countries.
Introduction to Anti-Bribery / Corruption Regulations

Analysis of the Foreign Corrupt Practices Act, UK Bribery Act, and ISO 37001
Global Perspective

The World Is Flush with Legal Restrictions on Bribery

- 41+ countries currently have their own bribery laws, and you can be fined under each regulation.
- Multinationals need to demonstrate compliance with local laws in every country they operate in.
- In 2015, the organization for international standards (ISO) published the first bribery standard; it will likely be widely adopted and will change the way you implement anti-bribery, anti-corruption compliance.
- Fines can be quite significant, with the largest settlement occurring last year for $1.78 billion.

1. Petrobras (Brazil) - $1.78 billion in 2018
2. Telia Company (Sweden) - $965 million in 2017
3. Siemens (Germany) - $800 million in 2008
4. VimpelCom (Netherlands) - $795 million in 2016
5. Alstom (France) - $772 million in 2014
6. Société Générale (France) - $585 million in 2018
7. KBR/Halliburton (US) - $579 million in 2009
8. Teva Pharmaceutical (Israel) - $519 million in 2016
9. Keppel Offshore & Marine (Singapore) - $422 million in 2017
Overview of the Foreign Corrupt Practices Act (FCPA)

Anti-bribery provision

Prohibits U.S. persons, U.S. companies or any other person in the U.S. from corruptly paying or offering to pay anything of value directly or indirectly to a foreign official to:

i. secure an improper advantage
ii. influence a foreign official in his official capacity
iii. induce him to violate the law or
iv. assist in obtaining, directing or retaining business

Proof of actual knowledge of a payment or promise to pay is not required.

 Applies to:
◆ Issuers
◆ Officers, directors and employees of issuers
◆ Foreign nationals and entities (including agents) that commit an act in the U.S.
◆ Domestic concerns (individuals/ entities)

Accounting provision

Requires SEC-registered or reporting issuers maintain books, records and accounts in reasonable detail that accurately and fairly reflect transactions and dispositions of assets and implement adequate system of internal accounting controls.

No materiality standard.

 Applies to:
◆ Issuers
◆ Individual officers, directors and employees of issuers
◆ Subsidiaries, joint ventures and affiliates owned and controlled (more than 50 percent voting power) by the issuer
Foreign Corrupt Practice Act – Key Concepts

- Can be induced by third parties
- "Anything of value" to obtain improper advantage
- “Government Officials” (any level)
  - officials or employees of government agencies
  - state-owned/controlled and state-sponsored organizations
  - public international organizations (UN and the World Bank)
  - official capacity on behalf of such organizations
- Penalties not limited to success
FCPA Enforcement as a Driver of Compliance

- Industry Sweeps
- More Whistleblower Bounties
- Large Settlements
- Cooperation Credits
- Individual Prosecutions

FCPA/Corruption Law Compliance Program
- Prevent, prepare, detect
- Effective design
- Operating efficiency
- Cost effectiveness
- Reduce loss
Comparison of FCPA with UK Bribery Act

**UK Bribery Act**
- Applies to private and public officials
- Includes receipt of a bribe (requesting, agreeing to receive or receiving)
- “Facilitation payments” are NOT permitted
- Defense for corporate liability if maintained ‘adequate procedures’

**FCPA**
- Only applies to foreign public officials
- Only applies to giving a bribe
- “Facilitation payments” are permitted
- No such defense for corporations
“An effective compliance program promotes ‘an organizational culture that encourages ethical conduct and a commitment to compliance with the law.’ Such a program protects a company’s reputation, ensures investor value and confidence, reduces uncertainty in business transactions, and secures a company’s assets. A well-constructed, thoughtfully implemented, and consistently enforced compliance and ethics program helps prevent, detect, remediate, and report misconduct, including FCPA violations.”
“Hallmarks of Effective Compliance Program”

- Tone at the top
- Code of conduct & compliance policies
- Oversight, autonomy, resources
- Risk assessment
- Training and continuous advice
- M&A due diligence and compliance program integration
- Third party due diligence, contracting and payments
- Confidential reporting and internal investigation
- Incentives and disciplinary measures
- Periodic testing/monitoring and continuous improvement

*Released in November 2012, A Resource Guide to the U.S. Foreign Corrupt Practices Act is the Department of Justice’s and Securities and Exchange Commission’s detailed compilation of information about the FCPA, its provisions and enforcement.
## A Closer Look “Hallmarks of an Effective Compliance Program”

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<tr>
<th>Hallmark</th>
<th>Description</th>
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<tr>
<td>Tone at the Top</td>
<td>Strong Ethical Culture, Communication across the organization</td>
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<td>Code of Conduct and Compliance Policies</td>
<td>Clear, Concise accessible to and acknowledged by employees</td>
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<td>Oversight, Autonomy, Resources</td>
<td>Independent Compliance Function, communication with Board and Audit Committee</td>
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<td>Risk Assessment</td>
<td>Analyze and address risks of operations</td>
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<td>Training and Continuing Advice</td>
<td>Regular training of high risk employees and third party business partners</td>
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<td>Assessment of Understanding</td>
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<td>Continual guidance</td>
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<td>Incentives and Disciplinary Measures</td>
<td>Involve compliance in evaluations, promotions and awards</td>
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<td>Third Party Due Diligence and Payments</td>
<td>Risk based due diligence, testing and monitoring</td>
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<tr>
<td>Confidential Reporting and Internal Investigation</td>
<td>Encouragement of Whistleblower hotline, process of investigation, and documentation of outcomes</td>
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<td>Mergers and Acquisitions: Due Diligence and Compliance Integrations</td>
<td>Due Diligence before the merger, FCPA Audits, &amp; integration</td>
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<td>Continuous Improvement: Periodic Testing and Review</td>
<td>How effective is the compliance program, keeping up with new and potential risks and adapting</td>
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Starts with “Tone at the Top”
## Similarities between major frameworks and guidance

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<td>Governance/Leadership</td>
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<td>Risk Assessments/due diligence</td>
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<td>Standards, policies &amp; Procedures</td>
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<td>Training and Communications</td>
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<td>Employee reporting</td>
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<td>Investigations</td>
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<td>Testing and Monitoring</td>
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<td>Third-Party Compliance</td>
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<td>Continuous Improvement</td>
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Common Red Flags
Common Risk Factors associated with Corruption

- Geography (CPI index)
- Industry (Energy, HealthCare / Life Science and Info Tec)
- Use of Intermediaries
- Interaction with Government Officials
- Use of petty cash / cash payments
- Higher risk third parties (e.g. travel agents)
- Discounts and Free Product
- Excessive gifts and travel / entertainment
- Lobbying
Corruption Risk, by Country

Visit www.transparency.org/cpi for more information

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Corporate Corruption Red Flags

- Excessive pressure within sales organization
- High level of incentive based compensation (vs. fixed)
- Operating in countries or industries notorious for fraud or corruption
- Expenses over budget
- Excessive consulting fees
- Unauthorized payments for goods and services
- Complaints from suppliers regarding bidding or relationships
- Fluctuations in vendor volumes
Procurement Red Flags

- Complaints from bidders
- Multiple contracts below procurement thresholds
- Unusual bid patterns
- Seemingly inflated agent fees
- Suspicious bidder
- Lowest bidder not selected
- Repeat awards to same contractor
- Poor quality work / service
- No prior experience
- Consultant provides services that are redundant to internal services
Third Party Red Flags

- Excessive commissions to third-party agents or consultants;
- Unreasonably large discounts to third-party distributors;
- Third-party “consulting agreements” that include only vaguely described services;
- Third-party consultant is in a different line of business than that for which it has been engaged;
- Third party is related to or closely associated with the foreign official;
- Third party became part of the transaction at the express request or insistence of the foreign official;
- Third party is merely a shell company incorporated in an offshore jurisdiction; and
- Third party requests payment to offshore bank accounts.
Recent Updates
The “Cooperation Era”

- Cooperation credit moves from a trial to a permanent concept
- DOJ lessens the demand for monitorships
- DOJ provides additional guidance surrounding pre-acquisition M&A due diligence
Cooperation Credit is Here to Stay

• In March 2018, The Department of Justice ("DOJ") expanded guidance related to the cooperation credit.

• The cooperation credit previously rewarded *only* organizations who voluntarily self reported, cooperated and remediated after committing FCPA violations.
  - Companies who have met the criteria in the past have been offered leniency with regards to criminal prosecution by the DOJ
  - Criminal prosecution is usually declined by the DOJ if there are no “aggravating circumstances”
  - When criminal prosecution is still pursued, companies who meet the criteria are generally offered a 50% reduction off of the minimum sentence levied
DOJ Pilot Program- FCPA Enforcement Plan and Guidance

Credit
Up to 50% Reduction in Bottom Sentencing Fine

April 5, 2016

U.S. Department of Justice
Criminal Division

Fraud Section
Washington, D.C. 20530

The Fraud Section’s Foreign Corrupt Practices Act Enforcement Plan and Guidance

Bribery of foreign officials to gain or retain a business advantage poses a serious systemic criminal problem across the globe. It harms those who play by the rules, siphons money away from communities, and undermines the rule of law.

Accordingly, the Department of Justice (Department) is committed to enhancing its efforts to detect and prosecute both individuals and companies for violations of the Foreign Corrupt Practices Act (FCPA), which criminalizes various acts of bribery and related corrupting fraud. This memorandum sets forth three steps in our enhanced FCPA enforcement strategy.

As the first and most important step in combating FCPA violations, the Department is intensifying its investigative and prosecutorial efforts by substantially increasing its FCPA law enforcement resources. These new resources will significantly augment the ability of the Criminal Division’s Fraud Section and the Federal Bureau of Investigation (FBI) to detect and prosecute individuals and companies that violate the FCPA. Specifically, the Fraud Section is increasing its FCPA unit by more than 50% by adding 10 more prosecutors to its ranks. At the same time, the FBI has established three new squads of special agents devoted to FCPA investigations and prosecutions. The Department’s demonstrated commitment to devoting additional resources to FCPA investigations and prosecutions should send a message to

1 This memorandum is for internal use only and does not confer any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, organization, party or witness in any administrative, civil, or criminal matter.

2 The Fraud Section of the Criminal Division has been given the authority to investigate and prosecute criminal violations of the FCPA, see USM 9-47-110, exclusively administers the FCPA Opinion program and, together with the Securities and Exchange Commission, publishes comprehensive consolidated guidance on the FCPA. As recognized by the Department, FCPA investigations involve unique challenges that present a compelling need for centralized supervision, guidance, and resolution, including complex issues involving international capture, collection of evidence, and enforcement. The Fraud Section, however, will frequently partner with the United States Attorneys’ Offices on such matters.
Cooperation Credit is Here to Stay

- In March 2018, the DOJ expanded the scope of the cooperation credit to companies facing DOJ investigations related to money laundering, accounting and securities fraud and healthcare fraud, among others.

- This position further establishes the heightened awareness of the DOJ in their pursuit of organizations engaging in fraud and corruption activities.

- Organizations should take steps to implement a robust compliance program that seeks to identify and detect misconduct.

- Ultimately, the DOJ will look more favorably upon an entity that is actively trying to create an ethical corporate culture.
Monitorships are becoming less prevalent

• Monitorships have in the past been a part of remediation efforts for companies who have engaged in misconduct

• An independent monitor is usually chosen by the court to help ensure that the company is following the terms of their settlement agreement

• In October 2018, the DOJ released the Selection of Monitors in Criminal Division Matters, which establishes policies and procedures for the selection of monitors

• This memorandum provides additional guidance on when a monitorship is necessary and when a monitor should be appointed
Monitorships are becoming less prevalent

• For example, the DOJ will consider “potential benefits” of a monitor based on various criteria, including but not limited to:
  − whether the underlying misconduct involved the manipulation of corporate books and records or the exploitation of an inadequate compliance program or internal control systems
  − whether the misconduct at issue was pervasive across the business organization or approved or facilitated by senior management;
  − whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal control systems
  − whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future.
Monitorships are becoming less prevalent

• An additional consideration outlined by the guidance is to “consider whether adequate remedial measures were taken to address problem behavior by employees, management, or third party agents, including, where appropriate, the termination of business relationships and practices that contributed to the misconduct.”

• This position indicates that the DOJ has a significant interest in seeing organizations remediate successfully without the assistance of a monitor, due to the significant burden (cost, resources, etc.) that can accompany a monitorship.

• Implementing robust compliance programs prior to an allegation can help demonstrate to the DOJ that a monitor is not necessary for that organization
DOJ providing lenience in M&A situations

- In this hot M&A market, the DOJ has taken steps to provide leniency for successor companies.

- DOJ intends to allow the cooperation credit for successor companies that uncover wrongdoing in connection with a M&A, post-acquisition, and subsequently disclose the misconduct, provide cooperation and remediate.

- The DOJ also encourages companies to perform adequate due-diligence prior to the transaction to uncover misconduct.

- When misconduct is discovered during the due diligence phase, companies should use FCPA Opinion Procedures guidance as a resource to help them decide whether to proceed with entering into the transaction.
New Compliance Requirements for Companies Using Instant Messaging Platforms

• In March 2019, the DOJ revised provisions in FCPA Enforcement Policy focused on corporate messaging services and platforms for business communications
  – New guidance focuses on establishing appropriate controls to prohibit “improper destruction or deletion of business records” in order to secure full cooperation credit
  – Prior policy was strict and required a company to demonstrate “appropriate retention of business records” to receive full remediation credit.
• However, it does not appear that this was previously considered as a remediation factor by the DOJ.
Many internal platforms do not allow the content of internal messages to be saved and thus makes the information unavailable after a short period of time. This creates a risk for the organization with regards to the new compliance requirements regarding instant messaging platforms.

While the amended policy does not layout specific guidance on proper controls, organizations need to take steps to ensure that policies are being developed and implemented that promote compliance. These tools should ultimately allow the organization to retain and easily access internal communications.

The organization should also consider developing risk assessments, training and communications and monitoring and testing to help ensure that the new compliance requirements for instant messaging platforms are being considered.
Polling question

- Based on today’s discussion, do you feel your company or your client’s have bribery / corruption exposure?
  A. Yes, high
  B. Yes, moderate
  C. Maybe
  D. No
THANK YOU FOR YOUR TIME AND ATTENTION