A map of South and East Asia, showing countries like India, Bangladesh, Burma (Myanmar), Thailand, Vietnam, Cambodia, Malaysia, and Singapore. Major cities like Delhi, Mumbai, Kolkata, Kathmandu, and Bangkok are labeled. The map is slightly blurred and has a warm, yellowish tint. A red text overlay is centered on the map.

**Navigating through the FCPA minefield,
debunking myths and addressing red
flags**

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MAYER • BROWN

Michael Volkov

mvolkov@mayerbrown.com

(202) 263-3288



worldcompliance

Basic FCPA Prohibitions

Anti-Bribery:

- Domestic concerns (defined as a U.S. person or corporate entity) are prohibited from making corrupt payments or promises to pay foreign officials for the purpose of obtaining or retaining business

Accounting / Recordkeeping Provisions:

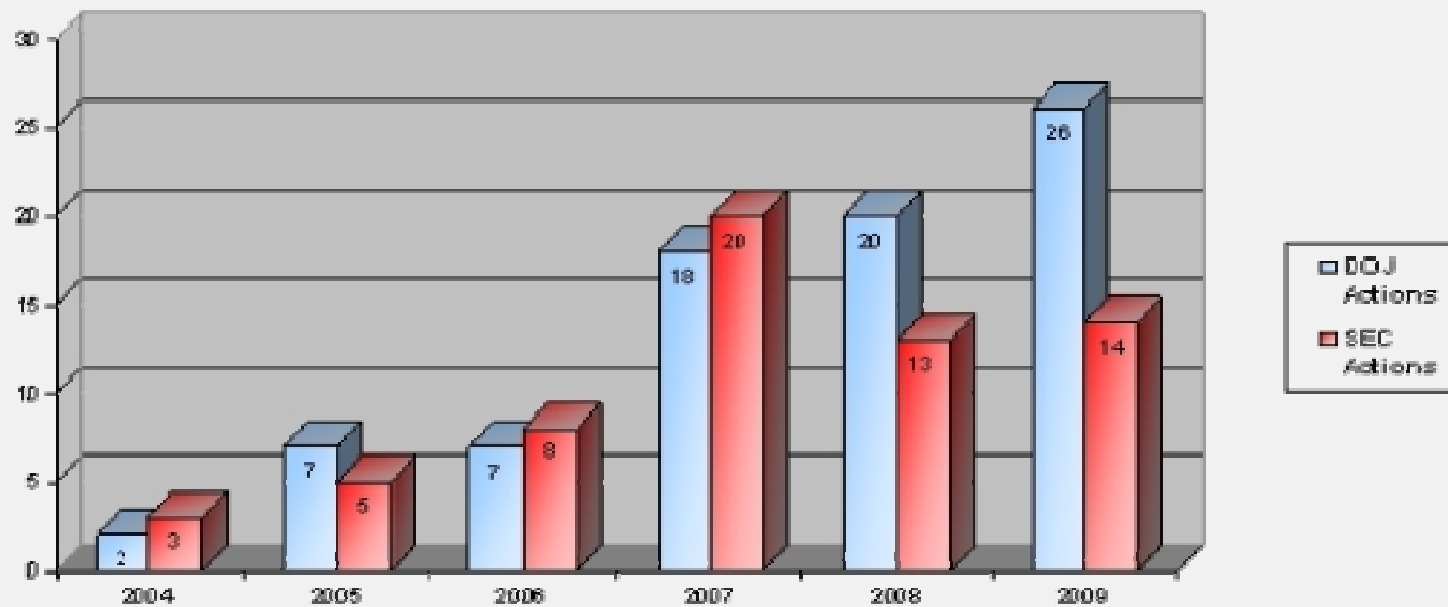
- Internal control and recordkeeping provisions applicable to corporations whose securities are registered with the SEC, or who must file regular reports with the SEC

Increased and Aggressive FCPA Enforcement

- ❑ **Corporate mega fines**
- ❑ **Obama administration's focus: "HIGH PRIORITY"**
- ❑ **New and aggressive investigative tactics**
- ❑ **Industry focus**

The Numbers Tell the Story

2004		2005		2006		2007		2008		2009	
DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC	DOJ	SEC
2	3	7	5	7	8	18	20	20	13	26	14



[1] Gibson, Dunn & Crutcher, LLP Publication "2009 Year-End FCPA Update" (Jan. 4, 2010)

Financial Reform Bill: Whistleblower's Bounty

- Whistleblowers eligible to recover between 10 and 30 percent of any settlement that exceeds \$1 million;
- SEC has been inundated with whistleblower complaints;
- Based on experience with Qui Tam and False Claims Act suits, whistleblower program will increase investigations and prosecutions

Aggressive Law Enforcement Techniques:

- **Strategies typically reserved for investigations of violent gangs and drug trafficking organizations (i.e. undercover sting operations)**
- **Search Warrants**
- **Undercover Officers**
- **Confidential Informants**
- **Wiretaps**

Global Industries are at the Greatest Risk

- **Pharmaceutical**
- **Telecommunications**
- **Energy**
- **Industrial / Technology**
- **Health Care**
- **Financial Services**

Seven FCPA Common Myths

Myth 1- FCPA does not cover conduct outside of the United States – **FALSE**

Turning a "blind eye" to business operations in overseas operations is a sure way to invite FCPA non-compliance issues.

The FCPA violation occurs when improper payments made outside of the United States, even if such conduct occurs without the knowledge or involvement of any US-based officer or employee.

Enforcement Examples: Ingersoll-Rand (2007) improper payments made by Italian and Irish foreign subsidiaries to Iraqi government under UN Oil for Food Program.

Kellogg, Brown Root (2009) liability based on actions by foreign subsidiaries where only connection to US was transfers between foreign bank accounts through US correspondent accounts.

Seven FCPA Common Myths (Continued)

Myth 2 - The FCPA applies only to public companies, not private companies – FALSE

FCPA's books and records and internal control provisions apply only to "issuers".

FCPA's anti-bribery provisions apply to issuers AND "domestic concerns" (corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship").

International business activity of private U.S. companies falls under the FCPA.

Seven FCPA Common Myths (Continued)

Myth 3 - The FCPA prohibits only bribes to secure business – **FALSE**

Anti-bribery violation can include payments to obtain an improper advantage compared to competitors doing business in the foreign country.

Enforcement Examples United States v. Kay (2004) (improper payments to a foreign official to lower corporate taxes and custom duties falls within the “obtain or retain business” element of an FCPA by providing an improper advantage over competitors).

Helmerich & Payne (2009) (improper payments through custom brokers to custom officials to expedite the importation and export of certain equipment)

Seven FCPA Common Myths (Continued)

Myth 4 - The FCPA applies only to interactions with foreign government officials – **FALSE**

Employees of a foreign company can be considered a "foreign official" if the foreign company is an "instrumentality" of a foreign government (a term not defined in the FCPA or the FCPA's legislative history).

Enforcement Examples [Snamprogetti Netherlands B.V. \(2009\)](#) – Instrumentality 49% government owned

[Kellogg Brown and Root \(2009\)](#) improper payments to employees of Nigerian Petroleum Corporation (state-owned)

Numerous drug and device manufacturers paid fines and are under investigation for making improper payments to doctors and health officials connected to state-owned hospitals

Seven FCPA Common Myths (Continued)

Myth 5 - The FCPA Does Not Apply When a Company Does Business in a Foreign Country Indirectly Through Third Parties (Agents, Consultants, Representatives and Distributors) – FALSE

Improper payments made to “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly to any foreign official.”

Knowledge requirement can be satisfied by “willful blindness” even if a company does not have actual knowledge

Enforcement Examples [York International \(2007\)](#) and [Halliburton \(2009\)](#) (enforcement actions where third party made payments and companies failed to conduct due diligence of third party agents)

Seven FCPA Common Myths (Continued)

Myth 6 - The FCPA does not apply when foreign officials travel to U.S. if the predominate purpose is business related – FALSE

FCPA prohibits payment of “anything of value” which includes travel expenses not connected to a legitimate business purpose.

Travel expenses can be paid for legitimate business purposes: to meet company personnel, to inspect products or a manufacturing facility, or to execute a contract

Enforcement Example Lucent Technologies (2007) violation for spending over \$10 million in travel, lodging, entertainment for 1000 employees of state-owned business, including sight-seeing and leisure recorded as "factory inspections" where no factory locations existed.

Seven FCPA COMMON MYTHS (Continued)

Myth 7 - The FCPA applies only when money is given to a foreign official – **FALSE**

“[A]nything of value” has been broadly construed to include discounts; gifts; use of materials, facilities or equipment; entertainment; meals and drinks; transportation; lodging, insurance benefits; and promises of future employment.

There is no minimum threshold -- the perception of the recipient and the subjective valuation of the thing conveyed is key factor

Enforcement Example: Veraz (2010) (civil fine for approximately \$4,500 worth of gifts to a Chinese, state-owned telecommunications company)

FCPA Affirmative Defense: Reasonable Bona Fide Expenditures

Payment of reasonable and bona fide expense related to promotion, demonstration or contract performance:

Enforcement Examples:

- Travel expenses to United States (FCPA Op. Proc. Rel. 7-01)
- Product samples for testing (FCPA Op. Proc. Rel. 9-01)
- Journalist stipends (FCPA Op. Proc. Rel. 08-03)
- Trips to tourist destinations (US v. Metcalf & Eddy, Inc.)

Top 30 Red Flags: What are they? What should you do?

Red flags are facts and circumstances that raise serious questions of an FCPA violation.

Companies which ignore red flags run the risk of FCPA enforcement actions, criminal fines and the need for costly remedial measures.

A red flag only means that further scrutiny is warranted.

General and Serious Red Flags (1-4) Require Extensive Inquiry and Compliance Review

- ▶ **Flag 1:** Your company has received an “improper payment” audit in the past five years
- ▶ **Flag 2:** Payment in a country with widespread corruption and / or history of FCPA violations
- ▶ **Flag 3:** Widespread news accounts of payoffs, bribes, or kickbacks
- ▶ **Flag 4:** The industry involved has a history of FCPA violations

Transaction-Specific Red Flags 5-9

Require Inquiry And Preventive Actions

- ▶ **Flag 5:** An agent, distributor, or joint venture partner refuses to confirm commitment to comply with FCPA
- ▶ **Flag 6:** Due Diligence process (WorldCompliance) identifies link between intermediary and government official
- ▶ **Flag 7:** Bad reputation of the agent or rumors of prior improper payments
- ▶ **Flag 8:** Listing of agent on databases listing known corruption risks (e.g. World Bank List)
- ▶ **Flag 9:** The intermediary requires that its identity not be disclosed

Transaction-Specific Red Flags – 10-14

Require Inquiry And Preventive Actions

- ▶ **Flag 10:** The foreign government customer recommends the intermediary
- ▶ **Flag 11:** The intermediary lacks the facilities and staff to perform the required services
- ▶ **Flag 12:** Systematic due diligence process reveals that the intermediary has violated local law, even if the violation is not related to bribery
- ▶ **Flag 13:** The intermediary wishes to use anonymous subcontractors
- ▶ **Flag 14:** Unusually large or frequent political contributions to a person or political party by the intermediary

Transaction-Specific Red Flags – 15-20

Require Inquiry And Preventive Actions

- ▶ **Flag 15:** Insistence on the involvement of third parties who provide no value-added
- ▶ **Flag 16:** A proposed foreign partner is owned by a key government official or a close relative
- ▶ **Flag 17:** Rumors of a silent partner in a joint venture partner, distributor, or agent that is not disclosed by the intermediary
- ▶ **Flag 18:** The proposed relationship is not in accordance with local laws or regulations
- ▶ **Flag 19:** The intermediary attempts to assign its rights or obligations to another party
- ▶ **Flag 20:** The intermediary has an unexplained breakup with another company

Control-Based Red Flags – 21-23

Require Extensive Inquiry and Compliance Review

- ▶ **Flag 21:** A joint venture partner insists on maintaining two sets of books for tax or other purposes
- ▶ **Flag 22:** An intermediary refuses to allow auditing of its books
- ▶ **Flag 23:** An intermediary requests payment of inadequately documented or entirely undocumented expenses

Payment Requests by Intermediaries Red Flags – 24-26


Require Extensive Inquiry and Compliance Review

- ▶ **Flag 24:** Payment of a commission that is at a level substantially above the going rate for agency work in a particular country
- ▶ **Flag 25:** Payment through convoluted means. If your agent asks for payment to a numbered account in the Bahamas
- ▶ **Flag 26:** Over-invoicing (i.e., the intermediary asks you to cut a check for more than the actual amount of expenses)

Payment Requests by Intermediaries Red Flags – 27-30

Require Extensive Inquiry and Compliance Review

- ▶ **Flag 27:** Requests that checks be made out to “cash” or “bearer,” that payments be made in cash, or payment made in other anonymous form
- ▶ **Flag 28:** Requests that payments be made to a third party
- ▶ **Flag 29:** Payment in a third country, which suggests a plan to divide the commission in the third country away from government scrutiny
- ▶ **Flag 30:** Requests for unusual bonuses, one-time success fees, or extraordinary payments



Ryan Morgan
FCPA Specialist

World Compliance

ryanm@worldcompliance.com

(305) 579-2298 x262

Case Study

Flag 6: Due Diligence process (World Compliance) identifies link between intermediary and government official

Foreign Official - any officer or employee of a foreign government or Any department, agency or instrumentality thereof [. . .] or any person acting in an official capacity for or on behalf of any such government, department, agency, or instrumentality

Process reveals link between:

- Family Member
- Business Associate
- Fully or partially owned by a state owned enterprise

Case Study

Links to foreign governments: PSI Report

- In the Permanent Subcommittee for Investigations report released in February 2010, the report mentioned dozens of companies and persons linked in hiding corrupt funds, including:
- Teodoro Nguema Obiang Mangue able to move \$110 Million into US Banking systems
- Jennifer Douglas, wife of vice president of Nigeria, brought \$40 million in funds into the US
- Pierre Falcone moved millions into US banking systems linked to illegal arms trade

Family Links



Entities List
Baddin, Neil
Berger, Michael Jay
Finestone, Paul
Grupo Sofana
Jeffers, Eve Jihan
Mangue, Teodoro Nguema Obiang
Obiang Nguema Mbasogo, Teodor

Details



Mangue, Teodoro Nguema Obiang

Last Name:	Mangue
First Name:	Teodoro Nguema Obiang
Category:	PEP
Sub Category:	Govt Branch Member
Level:	National
Date of Birth:	1971
Place of Birth:	Equatorial Guinea
Primary Country:	
Position:	Minister of Agriculture and Forestry (2004 - 2012)
National ID:	
Last Updated:	8/2/2010 10:40:00 AM

Case Study

Flag 7: Bad reputation of the agent or rumors of prior improper payments

- All countries have corruption investigations, not just the US. There are currently 140 FCPA investigations in the US and 120 corruption investigations ongoing in lesser countries such as Uganda.
- Each investigation abroad by a foreign entity can lead to a potential “landmine” for any organization tied into these corruption cases.

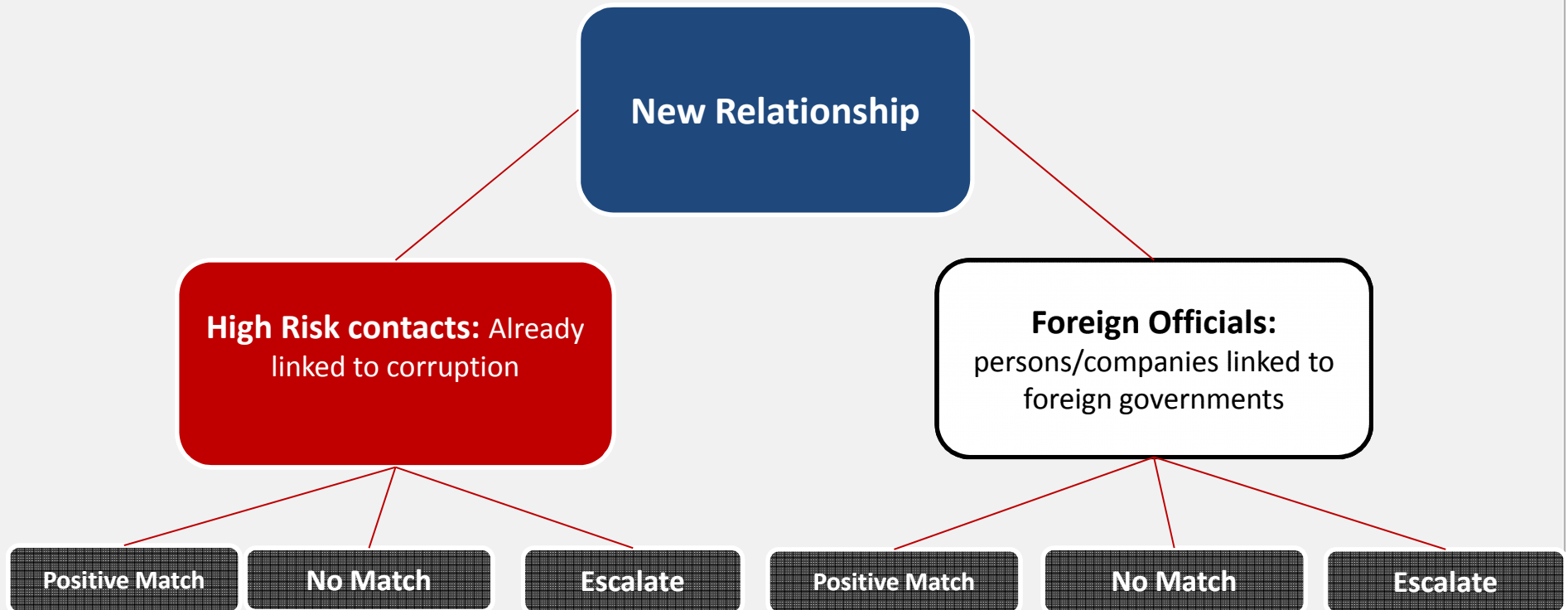
April 2010, German investigators raided offices at HP which led to an investigation by authorities in the States

Flag 12: Systematic due diligence process reveals that the intermediary has violated local law, even if the violation is not related to bribery

An organization's reputational history or its track record can be a precursor into corruption infractions:

- **Fraud**
- **Civil Lawsuits**
- **Money Laundering**
- **Embezzlement by executives**

Systematic Due Diligence



The Final Piece of the Puzzle

- ✓ Established your policy
- ✓ Trained employees
- ? Monitoring/Auditing As part of your “policing” of your policy, you need to perform ongoing due diligence on the following:
 - Resellers
 - Vendors
 - Marketing and other “consultants”
 - Export and other “agents”
 - Sales, licensing and other representatives
 - Lawyers
 - Accountants
 - Joint Venture Partners
 - Acquisition Targets

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Q&A



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