

# Foreign Corrupt Practices Act

*The FCPA and Individual Liability:  
A Trend or Is It Here To Stay?*

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# Outline for Today's Webinar

- Recent enforcement actions against individuals
- "Knowledge" and liability for individuals
- How to avoid personal liability: Best Practices for Mitigating Corruption Risks

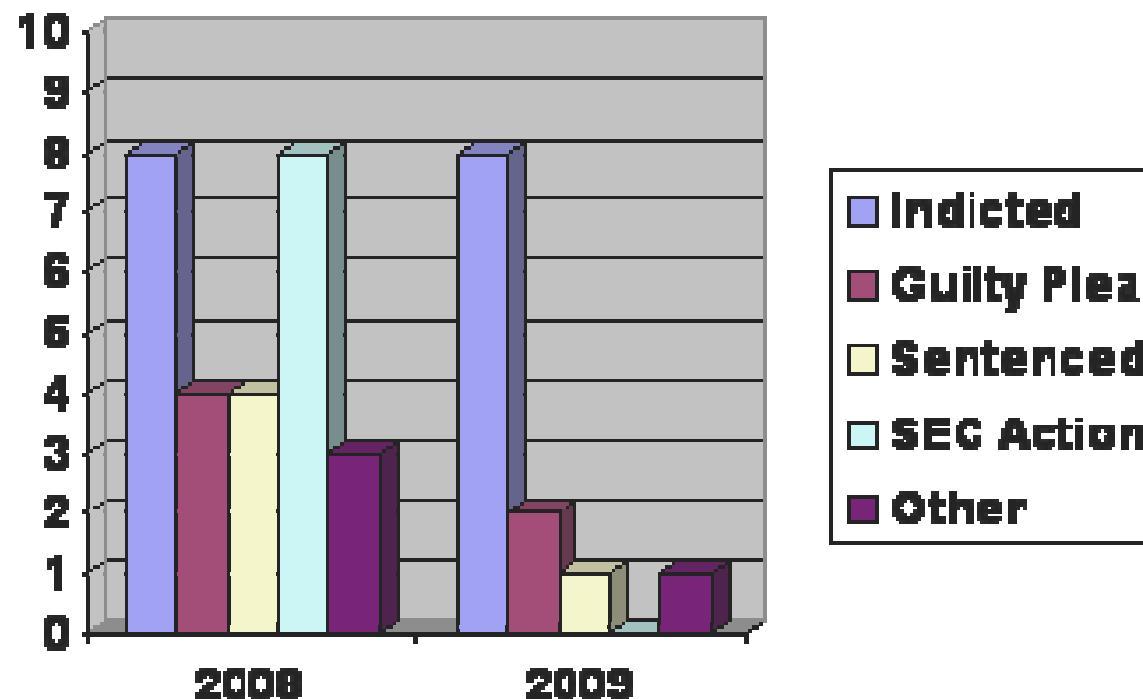
# FCPA Enforcement Activity Against Individuals

“The number of individual prosecutions has risen – and that’s not an accident. That is quite intentional on the part of the Department. It is our view that to have a credible deterrent effect, people have to go to jail. People have to be prosecuted where appropriate. This is a federal crime. This is not fun and games.”

— Mark Mendelson, US DOJ (September 2008)

# Recent Enforcement Actions Against Individuals

# Summary of Enforcement Action Against Individuals: 2008 and through April 31, 2009



## Review of 2008 Activity: Enforcement Actions Against Individuals

- DOJ Criminal Prosecution Activity
  - 8 Individuals Indicted
  - 4 Pleas by Individuals
  - 4 Individuals Sentenced
- SEC Civil Enforcement Activity
  - 8 Individual Settlements
- Other
  - 3 Private civil actions

## Review of 2008 Activity: Enforcement Actions Against Individuals (cont.)

- DOJ Criminal Prosecution Activity
  - Individual Indictments: 8
    - Media Industry: Contracts for film festival in Thailand.
    - Defense Equipment and Technology: Procurement contracts in Vietnam.
    - Oil and Gas Construction Projects: Gas pipeline projects in Ecuador and Nigeria.
  - Individual Pleas: 4
    - Oil Services: EPC Contract in Nigeria.
    - Defense: Procurement contracts in United Kingdom.
    - Aerospace: Procurement contracts in PRC.
    - Industrial Rubber Products: Procurement contracts in Argentina, Brazil, Ecuador, Mexico and Venezuela.
  - Individual Sentences: 4
    - Telecommunications (Alcatel): 30 months, forfeiture, supervised release
    - Multilateral Finance Institution (World Bank): 15 months
    - Telecommunications: (ITXC Corp): Two former executives received sentences of probation

## Review of 2008 Activity: Enforcement Actions Against Individuals (cont.)

- SEC Civil Enforcement Activity
  - Individual Settlements:
    - Oil Services (5)
      - KBR General manager
      - Willbros executives
    - Telecommunications (3)
      - ITXC executives

# Update on 2009 Activity: Enforcement Actions Against Individuals

(as of 4/31/ 2009)

- Indictments: 8
- Guilty Pleas: 2
- Sentenced: 1
- Other: DOJ Forfeiture Action

## Update on 2009 Activity: Enforcement Actions Against Individuals (cont'd)

- Indictments (8)
  - Oil services: Stemming from the enforcement action against Kellogg, Brown and Root, two indictments
    - Both U.K. citizens
  - Industrial valve manufacturer: Six indictments
    - Two non-U.S. citizens

## Update on 2009 Activity: Enforcement Actions Against Individuals (cont'd)

- Guilty Pleas
  - Industrial valve manufacturer:
    - Former director of global factory sales (Italian citizen) (unsealed in 2009)
    - Former finance director
- Sentenced
  - 51 months: Pursuant to guilt plea in 2008 (aerospace)

# Job Titles of Individuals Involved in FCPA Enforcement Actions

- Presidents, CEOs, officers, directors and other high-level executives
- Owner/manager
- Regional managers (sales, operations)
- Finance professionals
- Sales managers
- Other employees
- Agents and consultants

# FCPA Activity Related to Individuals: “Other”?

- Private Civil Litigation: 2008
  - Former CEO of Latin Node sued by acquiring company, eLandia International, Inc.
  - Former employee and consultants sued by Willbros International
- Forfeiture
  - January 2009, US DOJ filed forfeiture action against two individuals and one entity, seeking proceeds in Singapore bank accounts related to alleged bribery of Bangladeshi officials.

# Anti-Corruption Enforcement Activity outside the United States

- Signatories to the OECD Convention on Combating Bribery are investigating and enforcing
  - 16 signatory countries have initiated significant enforcement programs
  - Transparency International reports hundreds of enforcement actions against “supply side”
- Countries in which bribes occurred are investigating individuals, not just public officials who received the bribes

# Summary of Recent Enforcement Activity

- Over 50 individuals have been criminally prosecuted in the last 10 years
  - Of these, over 35 have resulted in guilty pleas
- For criminal prosecutions that have gone to sentencing, over half have involved prison time
  - Recent trend: Higher percentage of sentences involve incarceration
- Dozens of publicly-announced pending investigations
  - Each will involve individuals as well as the company

# “Knowledge” and Liability for Individuals

# FCPA Bribery Indictment – September 2008

## *United States v. Nguyen, et al.,*

...defendants, who are ***citizens*** of the United States and ***domestic concerns*** within the meaning of the FCPA, ***willfully*** made use of means and instrumentalities of interstate and international commerce...***corruptly*** in furtherance of an offer, gift, promise to give, and authorization of the giving of anything of value to any foreign official for the ***purpose of***:

- (i) influencing acts and decisions of such foreign official in his official capacity;
- (ii) inducing such foreign official to do acts in violation of the lawful duty of such official;
- (iii) securing an improper advantage;
- (iv) inducing such foreign official to use his influence with foreign government and instrumentalities thereof to affect and influence acts and decisions...in order to assist the defendants. (page 13).

# FCPA – Does it apply to you?

Jurisdiction generally depends on whether  
**A COMPANY OR OTHER PERSON**  
is an “issuer” or “domestic concern”  
as defined under the statute.

# FCPA – Does it apply to you? ISSUER

Issuers include:

- ◆ All companies with U.S. publicly registered securities,
- ◆ All companies required to file reports with the SEC,  
and
- ◆ All the officers, directors, employees and agents of  
those companies

# FCPA – Does it apply to you?

## DOMESTIC CONCERN

- A domestic concern may be a person or a business entity.
- All individual citizens, nationals, and residents of the United States are domestic concerns.
- Domestic concern also includes a corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a state, territory, possession, or commonwealth of the United States.

# Basis for Individual Liability under the FCPA

- As the “officer, director, employee, or agent” of an issuer or domestic concern. (15 U.S.C. §§ 78dd-1(a), 78dd-2(a))
- As a “citizen, national, or resident of the United States,” whether or not the conduct occurs in the U.S. (15 U.S.C. § 78dd-2(a), (h)(1)(A), (i))
- As “any person other than an issuer … or a domestic concern,” including “any natural person other than a national of the United States”
  - When that person, while in the territory of the United States, makes use of the mails or any means or instrumentality of interstate commerce or does any act in furtherance of an improper payment (15 U.S.C. § 78dd-3(a), (f)(1))

# What Constitutes “Knowledge” under the FCPA?

- Knowledge includes:
  - Actual knowledge
  - Awareness or suspicion that an event is likely to occur
  - Avoiding knowledge of corrupt acts through willful blindness
- “[T]he requisite "state of mind" for this category of offense include[s] a "conscious purpose to avoid learning the truth.” (H.R. Conf. Rep. No. 100-576, at 919 (1988))
  - “Thus the "knowing" standard … covers both prohibited actions that are taken with "actual knowledge" of intended results as well as other actions that, while falling short of what the law terms "positive knowledge," nevertheless evidence a conscience disregard or deliberate ignorance of known circumstances that should reasonably alert one to the high probability of violations of the Act.” (H.R. Conf. Rep. No. 100-576, at 919 (1988))

## What Constitutes “Knowledge” under the FCPA Anti-bribery Provisions? (cont'd)

- The FCPA prohibits *direct* transactions.
- It also prohibits *indirect* transactions – corrupt payments through intermediaries.
  - Intermediaries may include joint venture partners, consultants, agents, distributors, or professional services firms.
- It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official.

## Criminal Case Study – *United States v. Kay*

- Charges: Violations of FCPA anti-bribery provisions
- Defendants: Douglas Murphy, CEO; and David Kay, VP of Caribbean Operations of American Rice, Inc. (“ARI”) ARI, a publicly traded rice exporter.
- Facts: Authorized payments of bribes to Haitian customs officials to reduce duties and taxes on imported rice.
- Defenses: Lack of Business Nexus and Knowledge

# Criminal Case Study – *United States v. Kay* (cont'd) FCPA Business Nexus Test

- What are the range of potential payments covered by the “obtain or retain” business element of the statute?
- “[T]he concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid...Bribing foreign officials to lower taxes and customs duties certainly can provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business.”  
*United States v. Kay*, 359 F.3d 738 (5<sup>th</sup> Cir. 2004).

## Criminal Case Study – *United States v. Kay* (cont'd) FCPA Business Nexus Test

The obtain or retain element is satisfied as long as there is nexus between a payment to a foreign official and a monetary savings or gain that aids a company in carrying on business in some way.

## Criminal Case Study – *United States v. Kay* (cont'd)

- The Defendants claimed that they could not be guilty of a willful violation of the act in the absence of allegations and proof that they knew they were violating the FCPA.
- Fifth Circuit: Knowledge under the FCPA did not require defendants to have **specific knowledge** about the FCPA or its prohibitions, but rather required only that defendants knew generally that their actions were illegal. *United States v. Kay*, 513 F.3d 432, 446-51.

## FCPA Anti-bribery: Corrupt Intent

To constitute a “corrupt payment” under the FCPA, the person offering or authorizing the payment must have a “corrupt intent” and the payment must be intended to induce the recipient to misuse HIS OR HER official position to affect a decision by a government institution or employee to secure an improper advantage or to assist in obtaining, retaining, or directing business to anyone.

## FCPA Anti-bribery: Corrupt Intent (cont'd)

Corrupt intent includes:

- Influencing any act or decision of an official
- Inducing an official to do or omit any act in violation of HIS OR HER lawful duty
- Inducing an official to use HIS OR HER influence or affect any governmental act or decision

## Criminal Case Study: *United States v. Kay* (cont'd)

- A federal jury found both defendants guilty of twelve counts of violating the FCPA and one count of conspiring to violate the FCPA.
- Murphy, the former president of American Rice, was also convicted of obstruction of justice for making false statements to SEC officials during the government's investigation of the payment.
- David Kay, 37 months incarceration
- Douglas Murphy, 63 months incarceration

## *United States v. Nguyen, et al., (pending)*

- Jurisdiction – Defendants are U.S. citizens and qualified as domestic concerns.
- Knowledge – Willfully – a defendant must know that he is doing something unlawful at the time of his conduct. *United States v. Kay*, 513 F.3d 432, 449-50 (5<sup>th</sup> Cir. 2007)
- Corruptly -Was the payment made to influence a government decision - allegedly paid bribes to foreign officials for the purpose of obtaining contracts.

# FCPA Criminal Case Study: *United States v. Self* Knowledge and deliberate avoidance

- Charges: Anti-Bribery Provisions
- Defendant: Martin Self, President and part owner of Pacific Consolidated Industries (“PCI”)
- Industry: Defense contractor
- Disposition: Guilty plea, Probation, \$20,000 fine
- Facts:
  - Self caused the company to enter into a marketing agreement with relative of foreign official when he was not aware of any service the relative could provide.
  - He deliberately avoided learning the true facts of the marketing agreement and authorized approximately \$70,000 in payments to the relative despite being aware of the "high probability" that the payments to the relative were for the benefit of the foreign official.
  - Self purposely failed to investigate and deliberately avoided becoming aware of the full nature of PCI's relationship with the UK-MOD official's relative.

## FCPA – Knowledge Criminal Violation of Books and Records Provision

- It is a crime to KNOWINGLY
  - Circumvent or fail to implement a system of internal controls; or
  - Falsify any book, record of account

# *SEC v. David M. Pillor (2006)*

- SVP for Sales and Marketing, Invision Technologies, Inc.
  - InVision sold equipment to government customers in Asia through distributors and agents
- One of the Regional Sales Managers supervised by Pillor sent him email reporting what he understood from distributors and an agent about potential payments to officials in China, Philippines and Thailand.
  - China distributor: Invoiced for expenses incurred in avoiding penalties for late delivery. Pillor approved reduced payment against invoice.
  - Philippines agent: “In e-mail messages ... suggested that it intended to use part of any commission ... to make gifts or pay cash to Filipino government officials in order to influence their decision....”
  - Thai distributor: In an e-mail message, the Regional Sales Manager “alluded to the distributor’s intention to make payments to Thai officials...”
- **“Pillor did not respond to the Regional Sales Manager’s messages or acknowledge their receipt.”**

## Examples: SEC v. Pillor (2006) (cont'd)

- Pillor settled with the SEC on two charges:
  - Indirectly causing falsification of a book, record or account
  - Aiding and abetting InVision's failure to devise and maintain a system of internal controls.
- Pillor “knowingly or with extreme recklessness, provided substantial assistance to InVision’s violation of [the internal controls provisions of the FCPA]”
- In a parallel enforcement action against his employer, the SEC Complaint stated: “... InVision was aware of a high probability that its sales agents or distributors made or offered to make improper payments to foreign government officials in China, the Philippines and Thailand, in order to obtain or retain business for InVision.”

## Example: SEC v. Chandramowli Srinivasan (2007)

- Chief Executive of India-based, second-tier subsidiary of the U.S. issuer, Electronic Data Systems (“EDS”).
  - Srinivasan qualified as an employee of an issuer.
- According to the Complaint, Srinivasan paid two partly-state-owned customers to retain business.
- Falsified third party invoices in India, which “caused EDS to record these payments in accurately.”
  - No allegation that anyone at EDS was aware of the false invoices, but the “bribes allowed EDS to recognize over \$7.5 million in revenues from the Indian” subsidiary.

## Example: *SEC v. Chandramowli Srinivasan* (2007) (cont'd)

- Srinivasan settled with the SEC on charges of:
  - Bribery
  - Knowingly circumventing or knowingly failing to implement a system of internal accounting controls or knowingly falsifying EDS's books, records or accounts
  - Directly or indirectly falsifying or causing to be falsified EDS's books, records or accounts
- In a parallel enforcement action, EDS settled an SEC charge that it violated the accounting provisions of the FCPA, and paid disgorgement and interest totaling \$490,902.

# Consequences for Individuals

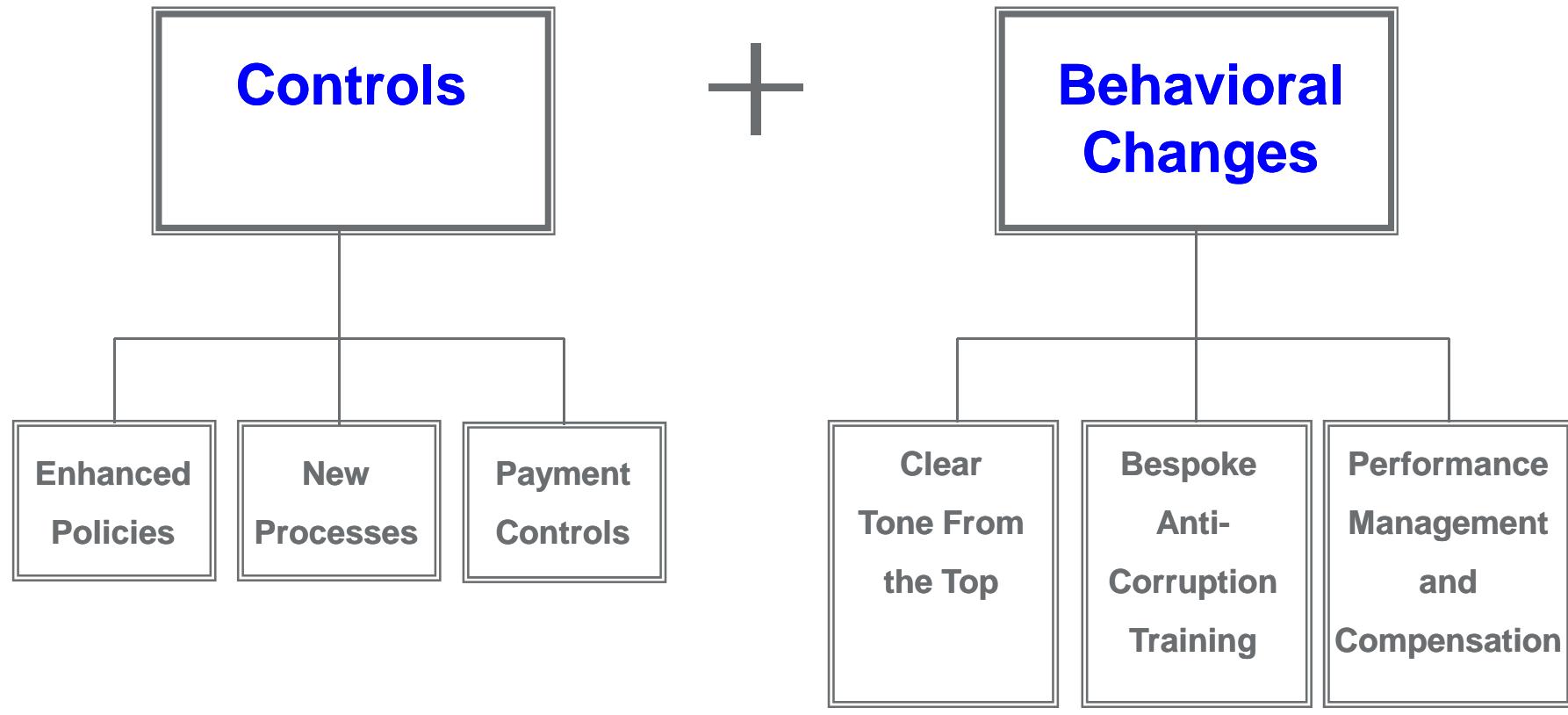
- Fines
  - Up to \$100,000 per violation or twice the amount of the gain from the conduct
  - No indemnity from employer
- Prison
  - Up to 5 years per violation
- Bar as serving as officer or director of public company
- Forfeiture action
- Civil judgment
- License actions

# Best Practices for Mitigating Corruption Risks

# Best Practices for Mitigating Corruption Risks

- Understand your risks
  - Research the corruption risk in your industry, location and business sector
- Know your business partners
- Conduct FCPA-specific due diligence of potential acquisitions
- Respond appropriately upon discovery of a potential FCPA violation
- Consult with compliance officer, internal auditor or outside counsel

# Elements of a Robust Anti-Corruption Program



Clear Personal Accountability and Responsibility

# Policies & Associated Documentation

- Specific Code of Business Conduct content on anti-corruption and financial crime
- Anti-Corruption Policy
- Policy on Use of Third Parties
- Third Party Protocols
- Procedures for T&E, Client Events, Hospitality
- FCPA M&A checklist
- Third Party “Toolkit” including:
  - Due diligence questionnaires
  - Anti-corruption contractual clauses for use with third parties
  - Compliance training and guidance materials for third parties

# Other Controls

- Policy Limiting Use of Third Parties applies to the use of third parties with respect to both government and non-government clients
- Regional Working Groups for Diligence
- Tone from the Top: Anti-corruption compliance is a business-led initiative
  - Global accountability with Corporation CEO and CFO and Board sub-committee oversight
- Customized training components including:
  - Online training for all employees
  - Topic-specific instructor-led training for target employees
- Performance Management and Compensation (bonuses, promotions)

Q & A



*Thank you*